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No. _____

In The

# Supreme Court of the United States

October Term, 1983

COUNTY OF ROCKLAND,

PETITIONER,

-V-

U.S. NUCLEAR REGULATORY COMMISSION, ET AL.,

RESPONDENTS.

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**Petition For a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## QUESTIONS PRESENTED FOR REVIEW

1. Was the December 22, 1982 decision of the Nuclear Regulatory Commission arbitrary, capricious, and an abuse of discretion?
2. Has the County of Rockland exhausted available administrative remedies?

## PARTIES

The petitioner below is the County of Rockland, a municipal corporation located within the State of New York.

The respondents are the United States Nuclear Regulatory Commission and the United States of America.

In the proceeding below, the Power Authority of the State of New York, now known as the New York Power Authority, and Consolidated Edison Company of New York, Inc., were admitted as intervenors-respondents. The New York Public Interest Research Group, Inc. and the Union of Concerned Scientists were admitted as intervenors-petitioners.

The State of New York, through its Attorney General, filed as amicus curiae.

## TABLE OF CONTENTS


| | Page No. |
|---|---|
| QUESTIONS PRESENTED FOR REVIEW | i |
| LISTING OF PARTIES | i |
| TABLE OF CONTENTS | ii |
| TABLE OF AUTHORITIES | iii |
| OPINIONS BELOW | iv |
| PRELIMINARY STATEMENT | 1 |
| STATUTES AND RULES INVOLVED | 1 |
| STATEMENT OF THE CASE | 2 |
| ARGUMENT | 8 |
| CONCLUSION | 8 |

APPENDIX

| | |
|---|---|
| DECISION IN U.S.C.A 2D | A-1 |
| U.S. NUCLEAR REGULATORY COMMISSION DECISION | A-24 |
| NUCLEAR REGULATORY COMMISSION REGULATIONS 50.47 | A-42 |
| NUCLEAR REGULATORY COMMISSION REGULATIONS 50.53,50.54 | A-48 |

## TABLE OF AUTHORITIES


| CASES CITED: | Page No. |
|---|---|
| *Local 1219, Am. Fed. of Gov. Employees v. Donovan*, 683 F. 2d 511, 516 (D.C. Cir. 182) | 6 |
| *Nadar v. Nuclear Regulatory Commission*, 513 F. 2d 1045, 1051 (D.C. Cir. 1975) | 6 |
| *Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, Docket No. 81-4188 (unpublished decision dated 12/15/81) | 2 |
| U.S. CODES AND REGULATIONS CITED: | |
| 5 U.S.C §705 | 1 |
| 5 U.S.C §706 (2) (A), 706 (2) (D) | 7 |
| 28 U.S.C §1254 (1) | 1 |
| 28 U.S.C §2342 | 1 |
| 42 U.S.C §2011, 2012 (d) 2013 (d) | 4 |
| 42 U.S.C §2231 | 1 |
| 10 C.F.R §2.206 | 7 |
| 10 C.F.R §50.47 | 1 |
| 10 C.F.R §50.47 (a) (1) | 4 |
| 10 C.F.R §50.54 | 1 |
| 10 C.F.R §50.54 (s) (2) | 2, 5, 6 |
| 10 C.F.R §50.54 (s) (2) (ii) | 4 |
| 10 C.F.R §50.54 (s) (3) | 2, 4 |
| 45 Fed. Reg. 55402 (1980) | 1, 4 |
| 45 Fed. Reg. 55406 (1980) (col. 1) | 2 |

## OPINIONS BELOW

The judgment of the Second Circuit Court of Appeals dated May 27, 1983, which judgment is sought to be reversed, is not as yet reported and is printed in the appendix to this petition at page A-1 - 1. The order of the United States Nuclear Regulatory Commission is printed in the appendix to this petition at page A-24.

## PRELIMINARY STATEMENT

Petitioner, County of Rockland, petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit, dated and entered May 27, 1983 (Docket Nos. 83-4003, 83-4037). The judgment denied a petition for review of a final order of the United States Nuclear Regulatory Commission, dated December 22, 1982.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). Jurisdiction of the United States Court of Appeals for the Second Circuit was conferred by 28 U.S.C. §2342 and the Administrative Procedure Act, specifically 5 U.S.C. §705, together with §181 of the Atomic Energy Act, 42 U.S.C. §2231.

## STATUTES AND RULES INVOLVED

The Nuclear Regulatory Commission Regulations involved in this case are 10 C.F.R. 50.47 and 10 C.F.R. 50.54, which are more fully set forth in the appendix hereto at Pages A-42-55.

## STATEMENT OF THE CASE

Nuclear Regulatory Commission (NRC) regulations require that for every operating nuclear power plant there be emergency plans by State and local officials for dealing with serious nuclear accidents (see 45 Fed. Reg. 55402 [1980]). The plans are required to provide for the evacuation of people situated within ten miles of each plant, and local officials must be ready and prepared to implement the plans in case an accident occurs.

A substantial portion of Rockland County and approximately 110,000 of its citizens reside within a ten mile radius of the nuclear power plant located at Buchanan, New York, and more commonly known as Indian Point Units 2 and 3. Consolidated Edison Company of New York, Inc. is the operator of Unit 2, while the Power Authority of the State of New York is the operator of Unit 2, while the Power Authority of the State of New York is the operator of Unit 3 (jointly the "licensees").

An emergency plan was drafted for Rockland County by consultants for the licensees of the Indian Point plants, but in May, 1982, Rockland County rejected the draft plan and began the process of developing its own emergency plan. On December 22, 1982, when the NRC issued its order, Rockland County did not have an emergency plan.

Under 10 C.F.R. 50.54(s) (2) and (3), A-53 the NRC has inspection and enforcement powers over nuclear plants which are initiated whenever it finds that "the state of emergency preparedness does not provide reasonable assurance that appropriate protective measures can and will be taken in the event of a radiological emergency." Once the NRC makes this determination, it commences what is generally known as a "120-day clock" giving the licensees of a nuclear reactor four months in which to correct the identified deficiencies. With regard to the Indian Point Units, the NRC has initiated two such 120-day clocks.

The first such 120-day clock occurred in April, 1981 as a result of deficiencies called to the NRC's attention by the Federal Emergency Management Agency ("FEMA"), which is responsible for reviewing the adequacy of State and local emergency plans. (See 45 Fed. Reg. 55406 [1980], col 1) At the conclusion of the four month period, the NRC concluded that the deficiencies had been corrected. That decision of the NRC was challenged in the United States Court of Appeals for the Second Circuit by the New York Public Interest Research Group (NYPIRG) and the Union of Concerned Scientists (UCS), but the challenge was dismissed on the grounds that the decision was not a final determination *(Union of Concerned Scientists v. U.S. Nuclear Regulatory Commission*, Docket No. 81-4188 [unpublished decision dated December 15, 1981]).

Subsequently, in June, 1982, FEMA reviewed the status of emergency planning at Indian Point following a drill, and found many deficiencies. The NRC, accordingly, on August 3, 1982, notified the licensees that they had 120 days in which to remedy the defects. FEMA reported back to the NRC in December, 1982, after expiration of the 120 days, and on December 22, 1982, the NRC decided to take no enforcement action. It is that decision by the NRC which is being challenged herein.

In its written report to the NRC, FEMA stated that it was unable to ... "conduct an exercise for the purpose of evaluating preparedness within this 120 day period. Following discussions between our respective agencies, it was agreed that the focus of FEMA's status report following the conclusion of the 120 day period would relate principally to the 'plan review' element of our process with a statement by FEMA of the feasibility of plan implementation" ... (FEMA letter dated December 17, 1982, Page 1)

In its decision of May 27, 1983, denying the petition of Rockland County, the U.S. Court of Appeals for the Second Circuit stated: "In reaching its decision, the Commission is guided by *among other factors*, the relative significance of the deficiencies, whether adequate interim compensating measures have been or will be taken promptly and whether there are additional compelling reasons for continued operation." A-21. The Court then found that the NRC had considered "among other factors, that substantial progress had been made to correct deficiencies at Indian Point that the remaining problems would likely be corrected within a short period of time and that the likelihood of severe nuclear accident in the intervening 'correction period' was extremely remote." A-21.

The Court concluded that the NRC's consideration of these factors was proper under its regulations, and that the decision reached by the NRC was not irrational.

The Court below further dismissed the petition of County of Rockland for failure to exhaust is available administrative remedies.

## ARGUMENT

I. The U.S. Court of Appeals for the Second Circuit failed to recognize and adhere to the two-part standard mandated by 10 C.F.R. 50.47 (a) (1) A-49 and 10 C.F.R. 50.54 (s) (2) (ii) A-53 which require that there be reasonable assurance that adequate measures *can* and *will* be taken in the event of a radiological emergency (emphasis supplied).

The development history of the emergency planning regulations make it clear that in promulgating its regulations the NRC intended to require both adequacy and implementability as a precondition to continued operation of nuclear facilities.

On March 28, 1979, the most serious accident in the history of nuclear power in the United States occurred at the Three Mile Island Nuclear Reactor, located near Harrisburg, Pennsylvania. While at that time, the Atomic Energy Act, 42 U.S.C. §2011, et seq. conditioned the development of nuclear energy upon protection of public health and safety (id., at §2012 [d], 2013 [d]). Prior to the accident the NRC was basically concerned with emergency planning for the operating plants themselves, and did not require evacuation or other emergency plans for the people surrounding nuclear plants.

The lesson learned from Three Mile Island was that ad hoc responses were not adequate for serious radiological accidents, and the NRC changed its policy on August 19, 1980 by the promulgation of the regulations at 45 Fed. Reg. 55402, et seq. 10 C.F.R. 50.54(s) (3), A-53 sets forth the role of the NRC and FEMA in determining the status of emergency plans. FEMA has been delegated the duty of making findings and determinations as to whether emergency plans are adequate and capable of being implemented. The NRC is to review the FEMA findings and in the event reasonable assurance does not exist, that appropriate protective measures *can* and *will* be taken in the event of a radiological emergency, the NRC must determine whether enforcement action is appropriate.

As stated earlier, the FEMA letter to the NRC of December 16th, at Page 1, stated that: "FEMA determined as outlined in my letter

to you of October 18, 1982, that it was unrealistic in light of the planned related activities that were under way to conduct an exercise for the purpose of evaluating preparedness within this 120 day period. Following discussions between our respective agencies, it was agreed that the focus of FEMA's status report following the conclusion of the 120 day period would relate principally to the 'plan review' element of our process with a statement by FEMA of the feasibility of plan implementation. This is to be followed by an evaluation of preparedness by FEMA at an exercise to be held in March, 1983."

As FEMA was unable to report on the question of implementation, at the expiration of the 120 day clock, the NRC was required to find that: "The state of emergency preparedness does not provide reasonable asurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. 50.54 (s) (2) A-53. FEMA was unable to find that plans would be implemented to protect the public, because the plans had not been tested, Rockland County had not even adopted a plan, and there was no adequate plan, even on paper, for evacuating people from Westchester County who depended upon public transportation in the event of a radiological emergency.

The decision of the NRC acknowledged that the FEMA review dealt with the adequacy of plans and the theoretical possibility of implementation, but did not address the state of preparedness, i.e., whether the State and local officials who would have to implement the plan were in a state of preparedness to implement it. A-2. The NRC also acknowledged that FEMA's test of preparedness was not going to be held until several months later. A-26-27 .

The decision of the NRC, however, determined that: "FEMA has concluded that the remedial actions that have been accomplished and those scheduled in the next few months constitute offsite plans that would be feasible and capable of implementation. Moreover, it is very unlikely that a severe accident would occur in these few months (until March or April of 1983) while progress continues. Thus, the Commission concludes that operation of Unit 2 (Unit 3 is not planned to go back on line until March or April of 1983) during this interim period would impose no undue risk to public health and safety." A-29.

10 C.F.R. 50.54 (s) (2), A-53 provides that the NRC, in deciding whether action should be taken in view of a lack of preparedness, consider several specific factors. One factor is whether the deficiencies in preparedness "are not significant for the plant in question." No such finding was made here nor could it be since Indian Point is unique in that its location is the most densely populated of any nuclear plant site in the country. Lack of preparedness, therefore, is especially significant for these plants.

Another consideration listed in 50.54 (s) (2) is whether "adequate interim compensating actions have been or will be promptly taken." That also was not the case here: it was to be several months before FEMA would test preparedness, and it was not known if the test would establish preparedness or negate it. With respect to the Westchester County bus driver problem, FEMA found that the State's proposal to use the National Guard was inadequate. With respect to Rockland County, the State's plan for the County would not be expected to meet the preparedness test for six months. Thus, in truth, there was no preparedness, and if an accident were to occur a catastrophe might have resulted.

The third consideration listed in 50.54 (s) (2) is whether "there are other compelling reasons for continued operation." But the Commission made no such findings. As Commissioner Asseltine's dissent states (A-40), the record before the NRC would not have supported such a finding.

The NRC, like other agencies, is required to comply with its own regulations. *Nadar v. Nuclear Regulatory Commission*, 513, F.2d 1045, 1051 (D.C. Cir. 1975); *Local 1219, Am. Fed. of Gov. Employees v. Donovan*, 683 F.2d 511, 516 (D.C. Cir. 1982). 10 C.F.R. 50.54 (s) (2) A-53 does not permit the NRC to ignore the question of implementability, based upon progress in planning which has taken place, or which will take place in the future. Nor do those regulations authorize NRC action on the basis of speculation that an accident probably will not happen or that if one does occur it is still possible that car-pooling will adequately evacuate transit dependent people, or that sheltering will be sufficient to protect the public.

The avowed purpose of the emergency planning regulations was to avoid the ad hoc response which occurred after the accident at Three Mile Island. It is difficult to imagine that the NRC, in promulgating its regulations, and mandating that operating nuclear reactors have emergency plans in place by April 1, 1981, intended implementability of emergency planning to be replaced by analysis of the risk of an accident or the statistical analysis that an accident will probably not be of sufficient magnitude to require evacuation.

In Rockland County alone, approximately 110,000 people reside within the ten mile radius of the Indian Point Nuclear Power Plant. In other counties which surround the Indian Point Plants, in excess of 150,000 additional people reside within the ten mile radius. Should a serious radiological accident occur at the Indian Point Power facilities today, the consequences to health would be astronomical.

The holding of the U.S. Court of Appeals for the Second Circuit has the effect of nullifying the intent behind the emergency planning regulations and eliminates all need for implementability. It is clear that emergency planning is a never-ending process which involves constant retraining and review of the planning process. However, under the regulations, planning alone is insufficient, and implementability must be achieved. For the above reaons, the NRC's decision was arbitrary and capricious, an abuse of discretion, and without observance of procedure required by law, and otherwise not in accordance with law (5 U.S.C. §706 [2] [A] 706 [2] [D]).

III. Had Rockland County exhausted the administrative remedies available to it as required by the U.S. Court of Appeals for the Second Circuit, its petition for agency review would have been mooted by the passage of time, and the further orders of the NRC. In point of fact, the application of NYPIRG/UCS under 10 C.F.R. 2.206 through which the Court found that NYPIRG/UCS has exhausted its administrative remedies, was filed in August of 1982, and "challenged the August, 1982 decision (of the NRC) to begin a second 120 day clock - it was not directed to the December, 1982 commission order." A-34. The 2.206 petition of NYPIRG/UCS was not denied by the NRC until February 3, 1983, approximately six weeks after the order of the NRC herein sought to be reviewed.

It would therefore have been a futile effort by Rockland County to pursue its administrative remedies regarding the December 22, 1983 decision of the NRC.

## CONCLUSION

FOR THE FOREGOING REASONS, THIS PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED, AND THE DECISION OF THE SECOND CIRCUIT SHOULD BE REVERSED.

Respectfully submitted,
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# UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1234, 1324—August Term, 1982

(Argued April 14, 1983 Decided May 27, 1983)

Docket Nos. 83-4003, 83-4037

COUNTY OF ROCKLAND,

*Petitioner,*

—v.—

U.S. NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,

*Respondents,*

POWER AUTHORITY OF THE STATE OF NEW YORK and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,

*Intervenors-Respondents,*

NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC. and UNION OF CONCERNED SCIENTISTS,

*Intervenors-Petitioners.*

Before:

FEINBERG, *Chief Judge*,
LUMBARD and MESKILL, *Circuit Judges*.

Petition for review of a Nuclear Regulatory Commission order. The Commission found that although deficiencies remain in emergency preparedness at the Indian Point nuclear power plant, several factors counseled against taking enforcement action at this time.

Petition for review is denied.

ERIC OLE THORSEN, Assistant County Attorney, County of Rockland, New City, New York (Marc L. Parris, County Attorney for the County of Rockland, New City, New York, of counsel), *for Petitioner*.

PETER G. CRANE, Acting Assistant General Counsel, U.S. Nuclear Regulatory Commission, Washington, D.C. (Herzel H.E. Plaine, General Counsel, E. Leo Slaggie, Acting Solicitor, Michael B. Blume, U.S. Nuclear Regulatory Commission, Washington, D.C., Carol E. Dinkins, Assistant Attorney General, Albert M. Ferlo, Jr., U.S. Department of Justice, Washington, D.C., of counsel), *for Respondents*.

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MESKILL, *Circuit Judge*:

One of the most emotional issues confronting our society today is the adequacy of safety measures at nuclear power facilities. Fueled by the Three Mile Island incident, the debate over nuclear safety persists as public interest groups charge that serious problems remain and operator-utilities seek to assure the public that all reasonable measures have been taken to protect surrounding populations in the event of a major nuclear accident. But it is the United States Nuclear Regulatory Commission (NRC or Commission) which must decide the difficult questions concerning nuclear power safety.

This appeal focuses on one important aspect of nuclear safety—off-site emergency preparedness. In its December 1982 decision and February 1983 order, the NRC concluded that although several deficiencies remain in off-site emergency preparedness at the Indian Point nuclear plant in Buchanan, New York,[1] several important factors counseled against enforcement action to shut down or otherwise restrict operations at Indian Point. *See* J. App. at 2-10, 29. Petitioner County of Rockland and intervenors New York Public Interest Research Group, Inc. and Union of Concerned Scientists (intervenors collectively NYPIRG/UCS) urge this Court to overturn the Commission's decision and its order, claiming that serious deficiencies in emergency preparedness remain at Indian Point and that the NRC committed a profound error of judgment by failing to take enforcement action.

County of Rockland's petition is dismissed because it has failed to exhaust available administrative remedies. With respect to intervenors NYPIRG/UCS, we find that the Commission properly applied its regulations and did not abuse its discretion in declining to take enforcement action at Indian Point.

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1 The Indian Point project is comprised of three nuclear generating units. Intervenor Power Authority of the State of New York (PASNY) owns and operates Indian Point Unit No. 3 under license from the State of New York and the NRC. Intervenor Consolidated Edison Company of New York, Inc. (Con Ed) owns and operates Indian Point Unit No. 2 under similar license. We are not privy to information concerning the existence, ownership and general operational status of Indian Point Unit No. 1, but this information is not necessary for purposes of deciding this appeal.

## BACKGROUND

### A. *Overview of Nuclear Plant Regulations*

The Atomic Energy Act of 1954 (AEA), Pub. L. No. 83-703, § 1 *et seq.*, 68 Stat. 919 (codified at 42 U.S.C. § 2011 *et seq.* (1976)), as amended by the Energy Reorganization Act of 1974 (ERA),[2] Pub. L. No. 93-438, § 1 *et seq.*, 88 Stat. 1232 (codified at 42 U.S.C. § 5801 *et seq.* (1976)), establishes a comprehensive regulatory framework for the ongoing review of nuclear power plants located in the United States. The NRC is charged under the AEA and ERA with primary responsibility to ensure, through its licensing and regulatory functions, that the generation and transmission of nuclear power does not unreasonably threaten the public welfare. Consistent with its administrative mandate, the NRC is empowered to promulgate rules and regulations governing the construction and operation of nuclear power plants. 42 U.S.C. § 2201(p) (1976); *see Public Service Company of New Hampshire* v. *United States Nuclear Regulatory Commission*, 582 F.2d 77, 82 (1st Cir.), *cert. denied*, 439 U.S. 1046 (1978).

We are concerned in this appeal with those Commission regulations that address off-site emergency preparedness.

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2 The ERA was adopted "[t]o reorganize and consolidate certain functions of the Federal Government in a new Energy Research and Development Administration [ERDA] and in a new Nuclear Regulatory Commission [NRC] in order to promote more efficient management of such functions." 88 Stat. 1233. Specifically, the licensing and regulatory functions of the Atomic Energy Commission were transferred to the NRC, 42 U.S.C. § 5842 (1976), and the energy research and development functions of the AEC were transferred to the ERDA, 42 U.S.C. §§ 5811-13 (1976 & Supp. I 1977). Although ERDA's administrative responsibilities have subsequently been transferred to the Department of Energy, Pub. L. No. 95-91, § 1, 91 Stat. 582 (codified at 42 U.S.C. § 7158(b) (Supp. I 1977)), the NRC retains jurisdiction over nuclear plant licensing and regulation.

*See generally* 10 C.F.R. Part 50, § 50.54 (1982). Prior to the Three Mile Island accident (TMI), there were no comprehensive guidelines or rules in place to coordinate off-site emergency preparedness in the event of a major nuclear accident. TMI taught that *ad hoc* responses to nuclear emergencies were ineffective. A Presidential Commission was created to address this problem and foremost among its recommendations was that each state and county located within a given distance of a nuclear power plant devise and implement an emergency preparedness plan for dealing with nuclear crises.

In partial response to the recommendations of the Presidential Commission, the NRC ordered that emergency preparedness plans be developed by each state and local government located within a ten mile radius of any nuclear power facility. 45 Fed. Reg. 55,402 (1980). The ten mile distance, although not etched in stone, was viewed by the Commission to be an appropriate "safety net" to assure adequate emergency preparedness.[3] States

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[3] The Commission regulation governing EPZs provides in pertinent part:

> (2) Generally, the plume exposure pathway EPZ for nuclear power plants shall consist of an area about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius. The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled nuclear reactors and for reactors with an authorized power level less than 250 MW thermal. The plans for the ingestion pathway shall focus on such actions as are appropriate to protect the food ingestion pathway.

10 C.F.R. § 50.47(c)(2) (1982). Those states and counties within the 50 mile "ingestion pathway EPZ" were not required to prepare and implement an emergency evacuation plan, but rather were expected, in the event of a nuclear accident, to monitor vegetation and air quality for abnormal traces of radioactive material.

and counties within the "emergency planning zone" (EPZ) were expected to include in their plans procedures to ensure rapid dissemination of information to the public and to accomplish safe, efficient evacuation of endangered populations in the event of a major nuclear accident. In the case of Indian Point, the State of New York and four surrounding counties—Westchester, Rockland, Orange and Putnam—were affected by this regulation which mandated that emergency plans be prepared and ready for implementation by April 1, 1981. We consider at length the various responses of the state and counties and analyze the status of off-site emergency preparedness at Indian Point after completing our examination of the administrative review process.

B. *Commission Review Process: State of Emergency Preparedness*

The adequacy of emergency preparedness at a given nuclear facility is evaluated jointly by the NRC and the Federal Emergency Management Agency (FEMA). FEMA's general mandate, as outlined in Executive Order No. 12148 (July 15, 1979), is "to coordinate the emergency planning functions of executive agencies." 45 Fed. Reg. 55,406 (1980). Under Presidential directive of December 7, 1979, FEMA has been assigned lead responsibility for off-site emergency preparedness with respect to each nuclear power facility located in the United States. *Id.*

To coordinate the administrative review process, NRC and FEMA executed a Memorandum of Understanding (MOU) outlining the various responsibilities of the two agencies. *See* 45 Fed. Reg. 58,847, 82,713 (1980). Under the MOU, FEMA's duties include (1) assisting state and county officials in the development of an emergency plan;

(2) training those state and county officials assigned to the emergency preparedness "team;" (3) developing and issuing an "updated series of [Federal] interagency assignments which would delineate respective agency capabilities and responsibilities and define procedures for coordination and direction for emergency planning and response;" (4) reviewing the status of emergency preparedness at each nuclear facility in the United States; and (5) making findings and determinations as to whether state and local emergency plans are adequate and capable of implementation. *See* 47 Fed. Reg. 36,387 (1982).

NRC's responsibilities under the MOU include (1) assessment of licensee emergency plans; (2) verification that licensee emergency plans are adequately implemented; (3) review of FEMA findings and recommendations regarding the adequacy of state and county emergency plans; (4) final decisionmaking authority to determine whether emergency preparedness is adequate or whether perceived problems are sufficiently serious to warrant enforcement action. *See id.*

The MOU and the enabling legislation found in the ERA make clear that the Commission is ultimately responsible for making the crucial decisions that arise with respect to emergency preparedness at nuclear facilities. The Commission's authority is broad—it may shut down a nuclear plant or take additional enforcement action if not satisfied with emergency preparedness.

The NRC's review is circumscribed by agency regulations. For facilities like Indian Point which are already operational, NRC regulations provide that emergency response plans for the operator-licensee and state and local governments shall be prepared and ready for implementation by April 1, 1981. 10 C.F.R. § 50.54(s)(2)(i) (1982). After that date, FEMA is charged with initial

responsibility to review the state of emergency preparedness at the nuclear plant. NRC regulations then require the Commission to review the FEMA report and to determine whether emergency preparedness provides "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.54(s)(2)(ii) (1982). If, after reviewing FEMA's recommendations and additional relevant factors, the Commission concludes that the evidence warrants a finding of "reasonable assurance," the agency review process is complete, subject of course to continuing oversight to assure that safety measures and emergency plans remain feasible and effective. If the Commission finds on the other hand that deficiencies in emergency preparedness are sufficiently serious to preclude a finding of "reasonable assurance," agency regulations allow a four month grace period, commonly referred to as a "120-day clock," to afford the operator-licensee and state and local governments an opportunity to correct remaining problems. 10 C.F.R. § 50.54(s)(2)(ii) (1982).

At the end of the 120-day period, the Commission must again assess emergency preparedness to determine whether the deficiencies have been adequately corrected. If emergency preparedness remains deficient, the Commission has three options: (1) it may shut down the nuclear plant until serious deficiencies are remedied; (2) it may take other enforcement action such as ordering a show cause hearing or requiring the licensee to take specific affirmative steps to correct a problem; or (3) it may decline to take any enforcement action. *Id.*

NRC regulations provide that the Commission, when determining whether enforcement action should be taken, "shall take into account, among other factors, whether

the licensee can demonstrate to the Commission's satisfaction that the deficiencies in the plan are not significant for the plant in question, or that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons for continued operation." *Id.*

C. *Experience at Indian Point*

In April 1981, FEMA completed its initial review of off-site[4] emergency preparedness at Indian Point and reported several deficiencies to the Commission, notably the confusion between state and county authorities as to their respective obligations to prepare and implement an emergency preparedness plan. Upon reviewing FEMA's report, the Commission instituted the 120-day clock to enable the state and counties to correct problems identified by FEMA. The State of New York subsequently adopted a comprehensive set of guidelines to identify and delineate the various emergency planning responsibilities for the state and local officials. The guidelines proved effective; after reviewing the compliance efforts of state and local governments, the NRC staff and FEMA both recommended that no enforcement action should be taken at Indian Point. FEMA qualified its finding, however, by noting that a final determination regarding the adequacy of off-site emergency preparedness could not be made until a full-scale trial exercise was conducted at Indian Point. Relying on these findings, the Commission allowed the 120-day clock to expire in August 1981 without taking enforcement action.

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[4] Commission regulations also require licensees to prepare and implement *on-site* emergency plans. 10 C.F.R. § 50.47 (1982). The adequacy of Indian Point's on-site emergency preparedness plan is not at issue in this appeal.

1. *June 1982 FEMA Report*

In June 1982 the NRC staff requested updated FEMA findings regarding the adequacy of emergency preparedness at Indian Point. FEMA responded on June 30, 1982 explaining that its present recommendations were based upon review of (1) updated and revised state and county plans; (2) the results of a March 1982 emergency preparedness exercise at Indian Point; and (3) comments made during two public meetings held in Westchester and Orange Counties. After outlining the grounds for its conclusions, FEMA reported deficiencies in five planning standards at Indian Point and identified thirty four sub-element deficiencies within the five standards.[5] Citing these problems, on August 3, 1982 the Commission instituted a second 120-day clock at Indian Point. The response was encouraging: five task forces, consisting of personnel from FEMA, the United States Environmental Protection Agency, the United States Food and Drug Administration, New York State, the Power Authority of the State of New York (PASNY), the Consolidated Edison Company of New York, Inc. (Con Ed) and three counties located in the EPZ[6]—Westchester, Orange and Putnam—were organized to address the deficiencies identified by FEMA. J. App. at 5. In the interim, the Commission asked FEMA whether it would be possible to conduct an

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5 In general, "sub-element deficiencies" are the more particularized problems that flow from deficiencies in the planning standard. Thus, for example, since Rockland County's planning standard was deficient due to the county's failure to devise a workable emergency plan, several "sub-element" problems—*i.e.*, related to evacuation, communication, coordination of governmental functions—potentially flow from that planning deficiency.

6 Rockland County is also within the Indian Point EPZ as identified by the Commission. Rockland officials declined to participate in the task force but did observe several planning sessions.

emergency exercise at Indian Point before the 120-day clock expired so as to better gauge the status of emergency preparedness at that facility. FEMA indicated that it was not feasible to arrange for an emergency session before the 120-day deadline, but did note that an exercise had been scheduled at Indian Point for March 1983.[7]

2. *December 1982 FEMA Report*

After the second 120-day clock had expired, FEMA submitted on December 17, 1982 an updated status report to the Commission. Representatives of FEMA briefed the Commission on December 21, 1982, addressing each of the thirty four sub-element deficiencies identified in its prior June 1982 report and indicating that substantial progress had been made to correct those problems. FEMA officials also noted the exemplary cooperation between the various governmental and private entities responsible for emergency preparedness at Indian Point. Despite their optimism, FEMA representatives identified five remaining deficiencies, four of which related to the absence of an emergency plan for Rockland County, the final deficiency focusing on the inability of Westchester County to secure a contract with local bus drivers to provide emergency bus evacuation in the event of a nuclear accident. *See* Br. of Respondents, Attachment 6, at 9-10.

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[7] The exercise took place on March 9, 1983 and FEMA reported to the Commission on April 14, 1983. In its Post Exercise Assessment, FEMA indicated that the five remaining problems identified in its December 1982 report—four related to the absence of an effective Rockland County plan and one related to the Westchester bus problem—had yet to be corrected satisfactorily. The Commission is presently in the process of reevaluating its December 1982 decision.

According to FEMA, the absence of a Rockland County plan raised serious problems.[8] FEMA representatives did state, however, that significant progress had been made in developing an effective Rockland plan, largely due to the increased commitment and resolve of Rockland County officials. With respect to the Westchester bus problem, FEMA pointed out that the absence of an "emergency service" contract with the local bus drivers union made doubtful emergency evacuation of endangered populations. Although the State of New York proposed that National Guard troops could be mobilized to provide emergency bus service, FEMA concluded that the additional four to five hours required for mobilization was unsatisfactory. FEMA representatives conceded, however, that progress in negotiations had been made and that prior experience had shown that bus drivers do not shirk their responsibilities during emergency evacuations.

A FEMA representative summarized the agency's views: "We feel that the majority, 29 of the 34 specific deficiencies that had been identified have been satisfactory [sic] resolved by submissions and updates of the plan. We feel that the other five have been partially resolved and are in the process of being worked [sic], and hopefully will be completely resolved in the near future." Br. of Respondents, Attachment 6, at 14. FEMA qualified its judgment, however, by noting that a more definitive assessment could be made after evaluation of the March 1983 exercise.

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[8] The three surrounding counties—Westchester, Orange and Putnam—had accepted an emergency plan developed by a private consultant who had been commissioned by the utility intervenors for this purpose. Rockland rejected this plan, choosing instead to devise its own plan. The FEMA report of April 14, 1983 indicates that Rockland has yet to complete this objective.

3. *Commission Decision of December 23, 1982*

After considering the available evidence and internal staff views, the Commission voted by a 3-2 margin on December 23, 1982, that no enforcement action would be taken presently at Indian Point.[9] The Commission observed that substantial progress in emergency off-site planning had been made at Indian Point and that all evidence indicated such progress would continue in the upcoming months. Moreover, the Commission noted that remedial actions proposed by the parties were feasible and capable of implementation within a short time. Finally, the likelihood of a major nuclear incident occurring within the "correction period" was viewed as very remote. Citing these factors, the Commission majority concluded that although deficiencies remained in emergency preparedness at Indian Point, these deficiencies were not sufficiently serious to warrant enforcement action at the present time. *See* J. App. at 8.[10]

Directing its attention to the Westchester bus problem, the Commission observed that substantial progress had

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9 Chairman Palladino and Commissioners Ahearne and Roberts voted with the majority. Commissioners Gilinsky and Asselstine dissented, urging that enforcement action should be taken immediately at Indian Point. *See* J. App. at 2-30.

10 The Commission qualified its decision by indicating that the conclusions reached therein would be reexamined after the March 1983 exercise had been evaluated by FEMA. Indeed, Commissioner Ahearne intimated that his vote was conditioned on the successful completion of the March exercise:

> This has been a close judgment and I wish to revisit this issue one month after the exercise, and certainly no later than the end of April. At that time we should have FEMA's evaluation of the exercise, as well as a resolution of the Westchester County bus driver issue and approved Rockland County emergency plans. If these do not occur, at present I do not believe I would support continued operation of the plants.

*See* J. App. at 19.

been made in resolving the busing issue and that interim measures were adequate during negotiations with Westchester bus drivers. The Commission explained that any emergency evacuation could be accomplished in part through carpooling and that experience had shown that bus drivers do not shirk their responsibilities during emergencies. Moreover, the NRC staff had represented that if a fast-breaking nuclear accident were to occur, *sheltering*, not evacuation, would be the preferred initial safety procedure until the radioactive plume had passed. Hence, the four-to-five hour delay in mobilizing National Guard troops would be less dangerous; by the time the radioactive plume had passed, National Guard troops would be positioned to evacuate surrounding populations.

Shifting its focus to the Rockland County situation, the Commission conceded that the county's failure to develop and implement an emergency plan raised troubling questions concerning the overall status of emergency preparedness at Indian Point. The Commission did indicate, however, that it was impressed with the efforts of Rockland officials to devise a workable emergency plan for the county. Moreover, the State of New York had developed a generic emergency preparedness plan that had been supplemented by site-specific planning for Rockland County. The Commission observed that a "senior management team (comprised of six state agencies) has been identified, and training has been initiated [to implement the state's generic plan in Rockland County]." J. App. at 7. The Commission viewed the state's plan as an adequate interim compensating measure while Rockland County worked to complete its plan.

## DISCUSSION

### A. *Procedural Claims*

#### 1. *Exhaustion: Rockland County*

The Commission, joined by utility intervenors PASNY and Con Ed, argue that Rockland's petition should be dismissed because the county has failed to exhaust available administrative remedies. We agree. This action reaches us on Rockland's petition for review of an administrative order in which the Commission declined to shut down or take alternative enforcement action at Indian Point. Our jurisdiction extends to all final orders of the Commission. 28 U.S.C. § 2342(4) (1976 & Supp. V 1981); 42 U.S.C. § 2239(b) (1976). Section 189 of the Atomic Energy Act states that "*any person whose interest may be affected*" by an order of the Commission is entitled to a hearing on request and shall be admitted "as a party to such proceeding." *See* 42 U.S.C. § 2239 (1976 & Supp. I 1977) (emphasis added), amended by 42 U.S.C. § 2239 (West Supp. 1983). Any party aggrieved by a final order of the Commission may file a petition for review in the court of appeals. 28 U.S.C. § 2234 (1976).

Rockland clearly qualified as an entity "whose interest may be affected" by the Commission's review of emergency preparedness at Indian Point. As such, the county could have participated in the December 1982 Commission proceedings and would have been entitled to party status for purposes of appeal. Alternatively, Rockland could have filed a section 2.206 petition[11] challenging the

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[11] Section 2.206 provides in pertinent part:

§ 2.206 Requests for action under this subpart.

(a) Any person may file a request for the Director of Nuclear Material Safety and Safeguards, Director, Office of Inspection and

December 1982 order and could have appealed in this forum if the Commission refused to grant its petition. 10 C.F.R. § 2.206 (1982); *see Rockford League of Women Voters* v. *United States Nuclear Regulatory Commission*, 679 F.2d 1218, 1219 (7th Cir. 1982); *Porter County Chapter of the Izaak Walton League of America, Inc.* v. *United States Nuclear Regulatory Commission*, 606 F.2d 1363, 1365 (D.C. Cir. 1979). If the county chose either of these options, the jurisdictional requirements of 42 U.S.C. § 2239 would have been satisfied.

The "party status" rule is premised on the exhaustion doctrine, a judicially created concept which serves a vital function in the context of administrative decisionmaking:

> The basic purpose of the exhaustion doctrine is to allow an administrative agency to perform functions within its special competence—to make a factual record, to apply its expertise, and to correct its own errors so as to moot judicial controversies.

*Parisi* v. *Davidson*, 405 U.S. 34, 37 (1972); *see McKart* v. *United States*, 395 U.S. 185, 194-95 (1968); *see generally Gage* v. *United States Atomic Energy Commission*, 479 F.2d 1214, 1217-21 (D.C. Cir. 1973). Since Rockland has failed to offer any convincing reason or justification for its failure to exhaust available administrative remedies, its petition is dismissed. *See Gage* v. *United States Atomic Energy Commission*, 479 F.2d at 1216 ("We hold that petitioners have come to the wrong forum with an inappropriate claim in search of an unavailable remedy."); *see*

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Enforcement, as appropriate, to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper.

10 C.F.R. § 2.206 (1982).

*also Susquehanna Valley Alliance* v. *Three Mile Island Nuclear Reactor*, 619 F.2d 231, 238-39 (3d Cir. 1980), *cert. denied*, 449 U.S. 1096 (1981).

2. *Exhaustion: NYPIRG/UCS*

Intervenors NYPIRG/UCS filed an administrative petition pursuant to section 2.206. Because the petition was considered and denied by the Commission, it is properly before this forum. *See Rockford League of Women Voters* v. *United States Nuclear Reguk latory Commission*, 679 F.2d 1218, 1221 (7th Cir. 1982); *Porter County Chapter of the Izaak Walton League of America, Inc.* v. *United States Nuclear Regulatory Commission*, 606 F.2d 1363, 1368 (D.C. Cir. 1979). However, that petition only challenged the August 1982 decision to begin a second 120-day clock—it was not directed to the December 1982 Commission order. Ordinarily, this flaw would be fatal insofar as our review of the unchallenged December order. However, the Commission's order of February 3, 1983 denying the NYPIRG/UCS petition makes it difficult to separate the merits of the August and December decisions. In fact, the Commission states in its February 1983 order that the December 1982 decision supersedes all prior NRC orders with respect to emergency preparedness at Indian Point and therefore no useful purpose would be served by review of the August decision to begin a second 120-day clock. By couching its order in these terms, the Commission implicitly has put in issue the merits of both the August and December 1982 decisions and we will consider all claims relating thereto.

3. *Finality*

The utility intervenors urge that the Commission's December 1982 enforcement ruling is not a final order

and hence is not appealable at this time. The utilities cite language in the December 1982 decision which states that the judgment to forego enforcement action will be reexamined after the March 1983 emergency exercise at Indian Point. J. App. at 10.

The fact that the Commission may reexamine its decision at a later date does not detract from the final nature of the December decision. The Commission unequivocably held that no enforcement action would be taken at Indian Point at that time and serious legal consequences flow from that decision—the intervenor utilities are authorized to restart operations at Indian Point. *See Port of Boston Marine Terminal Association* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *Illinois Citizens Committee for Broadcasting* v. *F.C.C.*, 515 F.2d 397, 402 (D.C. Cir. 1975). If a nuclear accident happened after the Commission declined to take enforcement action at Indian Point, the harm to surrounding populations could be immediate and the consequences catastrophic. *See Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 81-82 (1978); *New York Shipping Association* v. *Federal Maritime Commission*, 495 F.2d 1215, 1218-20 (2d Cir. 1974), *cert. denied*, 419 U.S. 964 (1975). To hold that this decision is nonreviewable would mean that any Commission order short of a shutdown order entered after a review of an emergency plan would be unreviewable.[12]

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12 The experience at Indian Point highlights the problems arising with respect to the finality doctrine in nuclear safety cases. The Commission is charged with oversight responsibility to ensure that safety precautions remain adequate at all nuclear facilities. Given the nature of its statutory mandate, *every* order is subject to reexamination as new findings are reported and exercises conducted. Indeed, the Commission is presently reevaluating off-site emergency preparedness at Indian Point after the March 1983 exercise. Notwithstanding these limita-

B. *Substantive Claims*

Intervenors NYPIRG/UCS mount a twofold attack on the Commission's December 1982 decision. They argue that the Commission failed to follow agency regulations when it declined to take enforcement action despite finding serious deficiencies in emergency preparedness at Indian Point. They also assert that the Commission acted arbitrarily and capriciously, and abused its discretion, by failing to shut down or to take other enforcement action at Indian Point.[13]

1. *Failure to Follow Agency Regulations*

Intervenors NYPIRG/UCS argue in substance that NRC regulations *require* the Commission to shut down or to take other enforcement action against a nuclear facility if it determines that (1) "the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency;" and (2) the factors enumerated in 10 C.F.R. § 50.54(s)(2)(ii) (1982) do not lead to a different result. We disagree.

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tions, every order filed by the Commission must be evaluated in light of the "finality" factors as articulated in the case law. *See, e.g., Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 69-72 (1970). Otherwise, the Commission potentially could insulate itself from appellate review simply by labeling a decision as "interim" or subject to reexamination.

13 Although not argued forcefully on appeal, intervenors NYPIRG/UCS did contend in their section 2.206 petition that the Commission acted in contravention of agency regulations and abused its discretion by ordering in August 1982 that a second 120-day clock be started at Indian Point. We find nothing in the language, legislative history or regulations promulgated pursuant to the AEA or ERA which would impose a one 120-day limitation on the Commission. Furthermore, the problems giving rise to the first 120-day clock were corrected and the second 120-day clock was started to address deficiencies identified *after* the first 120-day clock had expired.

NRC regulations provide that if the Commission determines that a finding of "reasonable assurance" cannot be made, then it must decide whether enforcement action should be taken. In reaching its decision, the Commission is guided by, *among other factors*, the relative significance of the deficiencies, whether adequate interim compensating measures have been or will be taken promptly and whether there are additional compelling reasons for continued operation. 10 C.F.R. § 50.54(s)(2)(ii) (1982). In this case, the Commission considered, among other factors, that substantial progress had been made to correct deficiencies at Indian Point, that the remaining problems would likely be corrected within a short period of time and that the likelihood of a severe nuclear accident in the intervening "correction period" was extremely remote. Weighing these factors, the Commission determined that no enforcement action should be taken at this stage in the emergency planning process at Indian Point. We find nothing in the language or legislative history of the AEA or ERA, nor in the regulations promulgated by the Commission, that would preclude it from relying on these factors when considering whether enforcement action is necessary. Congress has given the Commission considerable latitude to decide the difficult questions that arise with respect to nuclear safety. *See Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 543, 558 (1978). We will not unduly circumscribe that latitude by placing unwarranted restrictions on the agency review process.

2. *Propriety of December 1982 Decision*

The intervenors assert that the Commission acted arbitrarily, capriciously and abused its discretion by declining to take enforcement action to correct deficiencies in

emergency preparedness at Indian Point. Again, we disagree.

When considering a petition for review of a final Commission order, we are guided by the arbitrary and capricious standard found in section 10(e) of the Administrative Procedure Act. 5 U.S.C. § 706(2)(A) (1976). The courts have cautioned that the section 10(e) standard of review is "narrow," *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 416 (1971), and "highly deferential," *Ethyl Corp.* v. *E.P.A.*, 541 F.2d 1, 34 (D.C. Cir. 1976) (en banc), *cert. denied*, 426 U.S. 941 (1976). Although couched in different terms by the various federal courts, the fundamental duty of the appellate court on review remains well established:

> The test here is primarily one of rationality. If the Commission based its order on substantial relevant evidence, fairly ascertained, and if it has made no clear error of judgment, this court is not authorized to overturn that order.

*Cross-Sound Ferry Services, Inc.* v. *United States*, 573 F.2d 725, 730 (2d Cir. 1978); *see Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285-86 (1974); *Benmar Transport & Leasing Corp.* v. *I.C.C.*, 623 F.2d 740, 743 (2d Cir. 1980). Our review is deferential because the Commission and its staff have special expertise and a wide range of experience in nuclear power plant operation and safety.

The December 1982 Commission decision and February 1983 order were not irrational. The seminal question raised in the Indian Point proceedings was whether emergency preparedness would be sufficient to provide reasonable assurance that those people within the ten mile EPZ surrounding Indian Point would be adequately protected

in the event of a major nuclear accident. FEMA undertook an exhaustive study of this issue and found that substantial progress had been made in emergency preparedness at Indian Point and that the remaining deficiencies—the absence of a Rockland plan and the Westchester busing issue—could be corrected within a short period of time. The Commission reviewed the FEMA recommendations and ultimately made the difficult decision that, on balance, no enforcement action should be taken at that time. Intervenors have offered no convincing evidence to discredit the factual findings and conclusion reached by the Commission. We will not substitute our judgment for that of the Commission. There is substantial evidence in the record to support the Commission's decision.

We, of course, express no view on the proceeding regarding the Indian Point plant now pending before the Commission as a result of the March 1983 exercise.

Petition for review is denied.

**UNITED STATES OF AMERICA**
**NUCLEAR REGULATORY COMMISSION**

**COMMISSIONERS:**

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts
James K. Asseltine

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| In the Matter of | |
| CONSOLIDATED EDISON CO. OF NEW YORK, INC., and the POWER AUTHORITY OF THE STATE OF NEW YORK | Nos. 50-247<br>50-286 |
| (Indian Point Units 2 and 3) | |

**DECISION**

(CLI-82-38)

## I Background

Under 10 CFR 50.54(s), if the Commission finds after April 1, 1981 that the state of preparedness with respect to an operating nuclear power reactor does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency, and if the identified deficiencies are not corrected within 120 days, then a determination must be made whether the reactor should be shut down until the deficiencies are remedied; whether some other enforcement action is appropriate; or whether no enforcement action is needed. Under the regulation, the decision on enforcement action is to be guided by a balancing of factors, including: whether the deficiencies are significant for the plant in question; whether adequate interim compensating actions have been or will be taken promptly; and whether there are other compelling reasons for continued operation.

Efforts to improve emergency planning and preparedness related to Indian Point Units 2 and 3 have continued since the Commission's emergency planning regulations for operating reactors went into effect on April 1, 1981. The situation is complicated by the fact that planning and preparedness for Indian Point includes the interaction of the two Indian Point licensees, the State of New York, and four counties—Orange, Rockland, Putnam and Westchester.

The NRC had previously initiated a 120-day clock for emergency preparedness deficiencies related to Indian Point and the other operating nuclear power plant sites in New York State (Ginna, Nine Mile Point, and FitzPatrick). Letter from Boyce Grier, NRC, to licensees, dated April 24, 1981. The action was initiated based on memoranda sent to the NRC from FEMA headquarters which characterized and transmitted a FEMA Region evaluation of the New York State and County emergency plans.* The NRC letters to New York State nuclear power plant operators indicated that, although the assessment of the overall state of emergency preparedness had not been completed, the NRC was of the view that a number of the deficiencies identified by FEMA needed to be removed in order for the NRC to conclude that "appropriate protective measures can and will be taken in the event of a radiological emergency at your facility." The FEMA letter which NRC transmitted to New York State nuclear power plant operators stated that the Statewide Radiological Emergency Preparedness Plan was deficient in three broad respects, most important of which was the "conflict between State and county authorities and responsibilities pertaining to radiological emergency preparedness." This deficiency was said to "pervade" the plan, and unless resolved, the plan would remain deficient, even if all other planning standards were adequately addressed. In addition, the letter stated that the plan needed greater specificity in a number of areas, and that certain planning criteria had yet to be addressed. Our regulatory staff concluded in August 1981 that the deficiencies had been satisfactorily resolved, basing

*Memorandum dated April 2, 1981 and April 23, 1981 from John E. Dickey, FEMA, to Brian Grimes, NRC; letter dated April 6, 1981 from Vincent Forde, FEMA Region to William C. Hennessey, State of New York.

that conclusion on FEMA's advice that the state of planning was generally adequate. *See* FEMA letter dated August 19, 1981. FEMA observed at the same time that a final determination on the adequacy of preparedness could not be made until an exercise nad been observed at each site.

On June 16, 1982, the NRC staff requested an updated Federal Emergency Management Agency (FEMA) finding on the adequacy of offsite preparedness around the Indian Point site. FEMA's response, dated June 30, 1982, was based on a review of the radiological emergency response plans of the State of New York and the counties of Orange, Putnam, Rockland and Westchester; the performance of these political jurisdictions during an exercise of the plans conducted on March 3, 1982; and a review of comments made at two public meetings held in Westchester and Orange counties on July 26 and 27, 1982. Based on the review of the responses from the State of New York relating to the state and county components of the Radiological Emergency Preparedness Plan (REPP), and after review of the legislative action taken by the Rockland County Legislature (Resolution 320, dated May 18, 1982), FEMA determined that significant deficiencies existed with respect to five planning standards of NUREG-0654/FEMA-REP-1. Our regulations require compliance with these standards, as set forth generally in 10 CFR .sm.sm 50.47(b) and 50.54(q). Accordingly, the Commission notified the reactor licensees on August 3, 1982 that unless the significant deficiencies identified by FEMA were corrected within 120 days, the NRC would consider whether enforcement action was appropriate.

**II. Recent Developments Since August 3, 1982**

Following the Commission's August 3, 1982 notice, five task forces, consisting of personnel from FEMA, the U.S. Environmental Protection Agency, the U.S. Food and Drug Administration, New York State, the Power Authority of the State of New York (PASNY), Consolidated Edison Company of New York, and the three counties located in the 10-mile emergency planning zone (Westchester, Orange and Putnam) were organized to address the deficiencies. Rockland County was an observer at several sessions. In response to a request from the Commission that it conduct an exercise for the purpose of evaluating preparedness within the 120 day period, FEMA replied on October 18, 1982 that conduct of

such an exercise would be "unrealistic", in view of the planning-related activities then under way. Therefore, FEMA stated, the principal focus of its status report at the conclusion of the 120 day period would be the status of planning; it would also discuss the feasibility of plan implementation. Subsequently, FEMA will evaluate overall preparedness after an exercise to be held in March, 1983.

**III. FEMA's December 17, 1982 Status Report**

FEMA provided the Commission with a status report on offsite emergency planning for Indian Point on December 17, 1982. On December 21, 1982 FEMA briefed the Commission on its report. This report discusses the status of remedial actions, the concerns raised at public meetings, and provides an updated plan review. All 34 sub-element deficiencies that resulted in five "planning standards" being rated as significantly deficient in FEMA's earlier July 30, 1982 status report have been addressed in this report. During the 120 day clock, major improvements in offsite planning have occurred, and much work continues. FEMA stated that the REPG staff, employees of the counties, and personnel of both utilities "have put forth an impressive level of effort and, through effective management, hard work and dedication, have made significant progress." FEMA Update Report of December 16, 1982 at 3. However, despite this substantial progress, some problems remain, as we discuss below.

A. The Westchester County Radiological Emergency Response Plan (WCRERP) relies on both public and commercial bus drivers for emergency evacuation of populations dependent on public transportation. FEMA has expressed concern regarding the availability of these commercial bus drivers in an emergency because it does not believe that it has good information on how they would respond. As a compensating measure, the REPG proposes to rely upon New York State military forces (National Guard) to respond to an emergency at the Indian Point Nuclear Power Generating Station, to replace any private and public bus operators who do not respond. REPG has provided for FEMA's review a New York State Division of Military and Naval Affairs (DMNA) plan for the utilization of military forces to replace civilian bus drivers. This plan,

"OPLAN Radiological Emergency—Indian Point", sets forth detailed procedures for a DMNA takeover of bus fleets and evacuation by commercial and/or school buses manned by New York State military personnel of Westchester County residents dependent on public transportation.

According to FEMA's evaluation, the DMNA plan to compensate for the possible failure of local bus drivers to respond to a radiological emergency at Indian Point would increase normal evacuation times by 4 or 5 hours, assuming an emergency requiring evacuation from all sectors of the 10 mile EPZ as well as the failure of *any* private bus operators to respond. FEMA concluded that in a worst case situation (*i.e.*, an evacuation required for all sectors and no response by any commercial drivers), the additional time required for the military to respond was unsatisfactory.

B. Problems related to Rockland County's non-participation in the full planning process remain. FEMA feels that this situation has improved significantly since the initiation of the 120 day period. The State has developed a generic compensatory plan to deal with the problem of a county which either has an inadequate plan or elects not to participate. This generic plan is supplemented by site-specific planning for Rockland County. A senior management team (comprised of six state agencies) has been identified, and training has been initiated. This team and Rockland County personnel conducted a tabletop exercise on November 30, 1982. There has also been other training within the county. The State has furnished funds to the county for use in offsite plans and preparedness during the 120 day clock. Also, the county has initiated action on its own plan which is to be furnished in preliminary draft form to FEMA in January 1983. FEMA recognizes that while the status of plans and preparedness in Rockland County is not up to the standards both it and the county desire, action is ongoing to remedy the situation.

C. As noted, it was not feasible to conduct a preparedness exercise before the end of 120 day period. An exercise is scheduled for early March, 1983.

## IV. Need for Enforcement Action

The Commission has decided that no shutdown or other enforcement action is needed at this time. Several considerations lead us to this conclusion. First, substantial progress has been made since last July and additional progress will be made in the coming months. FEMA has concluded that the remedial actions that have been accomplished and those scheduled in the next few months constitute offsite plans that will be feasible and capable of implementation. Moreover, it is very unlikely that a severe accident would occur in these few months (until March or April of 1983) while progress continues. Thus the Commission concludes that operation of Unit 2 (Unit 3 is not planned to go back on line until March or April of1983) during this interim period will pose no undue risk to public health and safety.

Second, FEMA and the State of New York are working on the concern that there may be a bus driver problem in Westchester County. Compensating measures are proposed which would probably be adequate in many accident scenarios. Moreover, even in the event evacuation should prove infeasible because of a lack of drivers and delayed State response, many members of the public would share transportation by carpooling and sheltering without transportation could prove to be the most effective dose reduction measure in any event.

There are now commitments from Rockland County to solve the problem there by cooperating with state and federal officials in developing a plan. FEMA hopes to have a workable Rockland plan in early 1983. FEMA has stated that "FEMA staff has been most impressed with the recent efforts of the Rockland County officials to become active participants in the process". The seriousness of this deficiency must be viewed in light of two considerations. First, there is a state plan calling for state officials to take over county functions in the event that the county does not fulfill them. Though Rockland officials believe that this plan is inadequate, FEMA notes that the state plan should be recognized. Second, we recognize, as did FEMA in its briefing of the Commission, that federal approval of plans is not a mandatory prerequisite for effective emergency response in every case. Though less (or different) than what federal

authorities might prefer, state plans (and *ad hoc* responses) have in many cases proved sufficient in the past.

Finally, all the remaining problems relate to State and local governments and their role in offsite response. The problems are beyond the power of the licensees to control. Thus there is no question here of penalizing licensees for violations or other improper conduct on their part.

Our regulations allow but do not mandate immediate shutdown of the Indian Point units. We rejected a mandatory shutdown formulation when we adopted what is now 10 CFR 50.54(s) (2) (ii). *See* 44 *Fed. Reg.* 75171 (12/19/79); 45 *Fed. Reg.* 50705-07 (7/31/80). We do not believe that the two planning standard deficiencies noted by FEMA warrant immediate shutdown.

Accordingly, we have decided that no enforcement action is required at this time. However, the Commission will continue to monitor the progress that is made. FEMA has advised that an exercise will be conducted in March and it will be providing the Commission with an update on the status of planning and preparedness within 30 days thereafter. The status of emergency planning will be revisited by the commission upon receipt of FEMA's evaluation of the March 1983 exercise for Indian Point. In the interim, FEMA is asked to present to the Commission monthly reports on the status of Rockland County planning and training on the plans being developed, the status of resolution of the bus driver issue in Westchester County, and any other emergency preparedness issues that arise as work goes forward.

Commissioners Gilinsky and Asseltine dissent from this decision. The separate views of each Commissioner are attached.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C. this
22d day of December, 1982

## CHAIRMAN'S STATEMENT ON INDIAN POINT

Emergency planning and preparedness includes the interaction of the two Indian Point licensees, the State of New York and four counties—Orange, Rockland, Putnam and Westchester. Also, as noted by the Federal Emergency Management Agency (FEMA), emergency planning and preparedness is an evolutionary process. Emergency preparedness involves workable plans and confirmation of the workability of the plans by means of an exercise.

I believe that planning and training must be completed before a useful exercise can be held. The exercise held in March 1982 disclosed deficiencies which in part arose from the fact that State and county emergency plans had not yet been fully developed. Hence, in my opinion, the follow-up action called for by the Commission's start of the 120-day clock had to place emphasis on completion of these plans.

INDIAN POINT

Since that time considerable progress has been made in improving those plans; however, all of them have not yet been fully developed.

Since the principal issue in this regard is the state of development of the Rockland County plan, Rockland County should complete its plans before the March 1983 exercise is conducted.

Two areas of deficiency were noted in the interim FEMA findings: the lack of a plan by Rockland County and the possibility of non-response of bus drivers in Westchester County.

INDIAN POINT

While these deficiencies are being corrected, I believe that in the interim the Indian Point reactors can be allowed to operate for the following reasons:

A) Plans for all parts of the program have been developed except for the final Rockland County plan.

B) The State has a compensatory plan (generic) to handle any county with an inadequate plan and it is supplemented by site specific planning for Rockland County.

C) Rockland County is developing its own plan and expects to furnish a preliminary draft to FEMA in January 1983. FEMA has been impressed with the efforts of Rockland County officials to become active participants in the process.

## ADDITIONAL VIEWS OF COMMISSIONER AHEARNE

Prior to the Three Mile Accident there were essentially no offsite emergency plans. A major positive result of the analyses following that accident was the requirement that emergency plans have developed. None have been more difficult than those for the area around the Indian Point reactors. These difficulties stem from the large population surrounding the plants and the unusual multigovernment involvement required to develope sucessful plans. The reluctance of Rockland County for many months to participate is such an example.

The basic concept of emergency planning is to develope procedures and insure availability of necessary resources in order to adequately handle a very low probability but potentially high consequences accident. FEMA, the NRC, the State of New York, the four surrounding counties, the two utilities, and the public have been struggling with the question whether adequate emergency plans can be developed for Indian Point. There are many who believe they cannot, and consequently argue these plants should not be allowed to operate. There are some who believe the plans are already adequate. My position, which I believe is shared by many of the various government representatives, is that planning in this context is difficult, that we do not yet have assurance that the plans will work, but that substatial progress has been made over the several years of effort.

INDIAN POINT

D) The probability that evacuation plans will have to be activated due to a serious accident at Indian Point is very small and the probability of needing them while plans are being completed and tested is much smaller still. Nevertheless, if needed, most of the plans are available and compensatory measures can be taken for those that are not.

E) With regard to the possible non-response of bus drivers in Westchester County, I agree with the reasons for allowing the plant to operate set forth in the Commission's Memorandum of decision. Nevertheless, efforts to obtain expeditious resolution of this issue should be increased.

In our meeting yesterday, both the Deputy Director of FEMA and the FEMA Regional Administrator stressed that substantial progress has been made at Indian Point. Three years ago there was essentially nothing. Four months ago the combined effort had produced plans, but with thirty-four open items. Yesterday FEMA reported these had been reduced to five: one problem concerning bus driver availability in Westchester County and four problems concerning Rockland County.

The Commission now has to address whether or not we are to allow the reactors to remain operating. I believe we should, but conditionally.

Most of the surrounding population is in Westchester and Rockland Counties. Concerns about Westchester County have been decreasing rapidly as the planning efforts have continued. These planning concerns have been reduced to one issue, but an issue that has been constant over the many months of planning review. It is time to reach a resolution regarding a mechanism to provide adequate bus transportation for those who would need it.

We have received mixed signals with respect to Rockland County. FEMA has indicated substantial progress has been made and hopes to receive a Rockland County emergency plan early next year. On the other hand, the Vice Chairman of The Rockland County Legislature in a recent letter indicated there are many steps that have to be taken prior to approval of the county emergency plan that is being developed. Since Rockland County represents a substantial portion of the people within a 10-mile zone of Indian Point (probably around 40 percent), it is essential that adequate planning be done for the county. This also is an issue we must revisit.

I believe that the "adequate interim compensating actions" or "other compelling reasons" called for our regulations consist of (1) the substantial improvement that has been made during the running of the 120-day clock, evidenced by a reduction from 34 to 5 open items, and (2) the plans developed by the State of New York regarding use of state personnel for emergency duties in Rockland County and of National Guard personnel for bus drivers in Westchester County. FEMA has expressed its view that the latter is not adequate "in a worst case situation." However, these are only interim measures.

Some argue FEMA has addressed only planning and not implementation . As a consequence they argue we should not have any confidence in emergency preparedness at Indian Point. However, FEMA noted in their letter to Mr. Dircks of December 17th that "the 120-day timeframe in NRC's regulations is not keyed to the FEMA planning and preparedness evaluation process and has not been adequate to encompass all the actions necessary..."

In particular, FEMA has expressed the view that it cannot reach a conclusion on preparedness until the exercise scheduled for next March has been held. Thus the primary significance of FEMA's focus on planning is that it has been unable to complete the steps necessary to evaluate implementation, not that it has reached adverse conclusions. In fact, at our meeting FEMA indicated that not only is the plan feasible, but it is capable of implementation.

Consequently in light of the progress that has been made, the low probability of requiring use of the plans within the next four months (I note that for most of this time only one of the two plants is scheduled to operate), and the planned emergency exercise, I am willing to allow operation of the plants for now. This has been a close judgment and I wish to revisit this issue one month after the exercise, and certainly no later than the end of April. At that time we should have FEMA's evaluation of the exercise, as well as a resolution of the Westchester County bus driver issue and approved Rockland County emergency plans. If these do not occur, at present I do not believe I would support continued operation of the plants.

## ADDITIONAL VIEWS OF COMMISSIONER ROBERTS

I agree with the finding by the Commission majority that no shutdown or other enforcement action is currently warrented for Indian Point Units 2 and 3 for several additional reasons not included in the attached Memorandum.

Many of the deficiencies noted by FEMA go beyond the requirements of 10 CFR 50.47b and the joint NRC/FEMA emergency planning guidance contained in NUREG-0654/FEMA-REP-1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants". Thus, the fact that five of the original 34 sub-

elements are not completely resolved does not mean that the overall state of emergency preparedness is inadequate. The Commission must evaluate the significance of these remaining deficiencies and determine their effect on the overall adequacy of emergency planning at the site. Using that approach, I conclude that the Commission action was proper.

The FEMA status report indicated that the first deficiency deals with whether the bus drivers will respond in an emergency to assist in the evacuation of that portion of the public without private transportation. While it is desirable that the public transportation be available to assist in any evacuation, the availability of such services is not required by the Protective Response Planning Standards. That standard requires that (a) a range of protective actions have been developed for the plume exponse pathway EPZ for emergency workers and the public, (b) guidelines for the choice of protective actions be developed and in place, and (c) ingestion pathway protective actions have been developed. Nowhere does this regulation require that public transportation be available within a particular time frame.

FEMA admits that bus driver nonperformance is only speculative. Furthermore, it is FEMA's experience that in an emergency, designated emergency workers and volunteers do not shirk their assigned tasks but do a good job.

FEMA indicated that the compensating actions planned by the State of New York to utilize National Guard personnel as bus operators may not be adequate during a fast-breaking accident. The NRC staff indicates that in such low probability events **sheltering,** not evacuation, is usually the preferred initial protective action until the plume has passed. After the plume has passed an evacuation might be considered. Therefore, in such a fast breaking scenario, time would be available to mobilize National Guard or other State resources. For these reasons, I feel the public transportation provisions of the county and New York emergency response plans are sufficient.

Rockland County's failure to participate in past emergency planning efforts was cited as the reason for the planning standard P. Responsibility for the Planning Effort, not being satisfied. As a compensating measure, the State of New York has agreed to take

over the necessary response activities. State management teams have been selected and are being trained to implement the compensating plan. Additionally, Rockland County is now developing an emergency response plan which will be completed in early 1983. I feel these steps constitute adequate interim compensatory actions.

While FEMA indicated that the majority of deficiencies were corrected by emergency planning improvements, it felt that a conclusion on emergency preparedness could not be made until an exercise could be conducted to test the emergency plans. I feel that this introduces an artificial distinction between "planning" and "preparedness". While I agree that there is much more to emergency preparedness than mere paper plans, I do feel that considering an emergency exercise as the only true test of preparedness is inappropriate.

Much can be learned of emergency preparedness from methods other than from joint exercises, such as smaller drills, training, and interaction with offsite emergency response personnel. An emergency exercise is but one method to evaluate the state of emergency preparedness. Because of this, and based on the comments from FEMA, we can indeed say that the overall emergency preparedness has significantly improved around the Indian Point site.

## SEPARATE VIEWS OF COMMISSIONER GILINSKY REGARDING INDIAN POINT

The Indian Point nuclear power plants should not be allowed to operate until the Federal Emergency Management Agency can advise this Commission that—in the words of our regulations—there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

The State and Counties performed so poorly in the Indian Point emergency exercise earlier this year that the Commission had to initiate a four-month remedial period. Indian Point is the only nuclear power plant site in the United States for which this was necessary. The four-month period ended December 3, 1982. Under our regulations, the Commission must now assess the situation and decide whether the plants should continue to operate.

This is the second time the Commission has had to initiate such a remedial period at Indian Point. The previous one was triggered by deficiencies found in the first review of emergency plans in April, 1981. Many of the planning deficiencies cited after the 1982 exercise were similar to those found in the 1981 review.

We have now been informed by FEMA that some of the significant deficiencies have still not been corrected. Moreover, while it stressed that improvements have been made, FEMA declined to make a finding that there is adequate emergency preparedness in the vicinity of Indian Point until it reviews the results of a full-scale exercise scheduled for March of next year.

In view of this unfortunate history of State and County performance, and the obvious fact of uniquely high population in the Indian Point area, we should not approve operation of the power plants without a favorable FEMA finding on emergency preparedness.

I would add that I agree with Commissioner Asselstine's legal analysis.

## DISSENTING OPINION BY COMMISSIONER ASSELSTINE

I strongly disagree with the decision today by the Commission majority to delay a decision on the adequacy of emergency preparedness at the Indian Point plants until after the Federal Emergency Management Agency's evaluation of the March 1983 exercise and to take no enforcement action at this time regarding emergency preparedness for the Indian Point plants. For the reasons set forth below, I believe that our regulations require that the Commission promptly consider in detail the need for enforcement action, including the shutdown or derating of the Indian Point plants, based upon the present state of emergency preparedness for those plants. I therefore would issue a "show cause" order requiring that the Indian Point plants be shut down until either (1) FEMA finds that the significant deficiencies in emergency preparedness for the Indiant Point plants have been corrected, or (2) the licensees demonstrate, in accordance with our regulations, that continued operation of the plants is warranted in the absence of such a finding by FEMA. I also believe that the public interest requires that such a "show cause" order be made immediately effective in the case of the Indian Point plants. This would prevent the Indian Point plants from resuming operation until FEMA determines that all significant emergency preparedness deficiencies have been corrected or the Commission has sufficient information to determine that the resumption of plant operations is warranted for other reasons.

*Discussion*

The Commission's regulations (10 CFR section 50.54 [s] [2] [ii]) contemplate a two-state process for Commission review in those cases in which significant deficiencies in emergency preparedness have been identified. At the end of the 120-day period provided for the correction of deficiencies, the Commission must consider whether the deficiencies have been sufficiently corrected to permit a finding that the state of emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. If it can make this finding, the Commission need not consider possible enforcement action.

However, if the Commission *cannot* make this finding at the end of the 120-day period, it must consider the need for enforcement actions, including the shutdown or derating of the plant, taking into account, among other things, the factors specified in our regulations. Following consideration of those factors, the Commission must decide on the need for enforcement action until the significant emergency preparedness deficiencies have been corrected.

In the case of the Indian Point plants, much has been done to correct the numerous deficiencies in emergency *planning* that were identified by FEMA in its August 2, 1982, letter that served as the basis for commencing the 120-day period. These improvements, which are documented in the December 19, 1982, report to the Commission from FEMA, have come about as the result of recent efforts by the State of New York, the involved local governments, FEMA and other involved Federal agencies. Based upon these efforts, FEMA has concluded that the significant deficiencies *in planning* have been sufficiently corrected to permit an overall finding that *emergency planning* is adequate.

However, FEMA has advised the Commission that it is unable to reach a judgment at this time on the overall adequacy of *emergency preparedness*—that is, whether the planning measures can and will work in the event of an accident. It is important to recognize that our regulations speak in terms of *preparedness* and not planning. Thus, on the fundamental finding required by our regulations at the end of the 120-day period, FEMA has advised the Commission that it is *not* able to find that the state of emergency preparedness for the Indian Point plants provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

I believe that FEMA's advice on this matter is entitled to great weight, and I see no basis for the Commission to conclude at this time that there is reasonable assurance that the Indian Point emergency plans will, in fact, work in the event of an accident. Indeed, I do not read the majority's decision as reaching such a conclusion.

The question thus before the Commission today is whether, in the absence of reasonable assurance that the Indian Point emergency plans will work if needed, some enforcement action is warranted. The need for, and nature of, such enforcement action involves a balancing of relevant factors.

For the reasons that follow, I believe that enforcement action, in the form of a "show cause" order, is justified. I also believe that the public interest requires that such an order be made immediately effective, thereby preventing further operation of the Indian Point plants until the significant deficiencies in emergency preparedness have been corrected or until the Commission has sufficient information to support a finding that continued operation is warranted.

In my view, three factors justify the issuance of an immediately effective "show cause" order. First, there is not reasonable assurance now that the emergency plans for the Indian Point plants, even though improved, will function adequately in the event of an accident. Second, significant deficiencies in emergency preparedness for the Indian Point plants have existed for the past 20 months and, despite the institution of two 120-day periods during that time, it is still not possible to predict when those deficiencies will be corrected. The lack of further enforcement action leaves open the possibility of unlimited future operation of the plants in the face of continuing significant deficiencies in emergency preparedness. Third, emergency preparedness, although an important element in all cases, is of particular significance in the case of the Indian Point plants, given the large population in the vicinity of the Indian Point site.

I believe that these three factors outweigh the factors cited by the Commission majority in its decision not to pursue any enforcement actions at this time. In particular, I do *not* believe that the progress to date in improving planning, though laudable, or the probability of a serious accident involving off-site releases justifies the Commission majority's no-action decision or the unlimited future operation of the Indian Point plants. In addition, I do not believe that the Commission has before it in the record other information that demonstrates a compelling need for continued operation of the Indian Point plants until the significant deficiencies in emergency pre-

paredness are corrected. For these reasons, I would issue an immediately effective "show cause" order requiring the shutdown of the Indian Point plants until FEMA has determined that the significant deficiencies in emergency preparedness have been corrected, or until the licensees have provided sufficient information to justify the continued operation of the plants.

## PART 50 • DOMESTIC LICENSING OF PRODUCTION AND UTILIZATION FACILITIES

**§ 50.47 Emergency plans.**

(a)(1) Except as provided as in paragraph (d) of this section, no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

(2) The NRC will base its finding on a review of the Federal Emergency Management Agency (FEMA) findings and determinations as to whether State and local emergency plans are adequate and whether there is reasonable assurance that they can be implemented, and on the NRC assesment as to whether the applicant's onsite emergency plans are adequate and whether there is a reasonable assurance that they can be implemented. A FEMA finding will primarily be based on a review of the plans. Any other information already available to FEMA may be considered in assessing whether there is reasonable assurance that the plans can be implemented. In any NRC licensing proceeding, a FEMA finding will constitute a rebuttable presumption on questions of adequacy and implementation capability. Emergency preparedness exercises (required by paragraph (b)(14) of this section and Appendix E, Section F of this part) are part of the operational inspection process and are not required for any initial licensing decision.

(b) The onsite and, except as provided in paragraph (d) of this section, offsite emergency response plans for nuclear power reactors must meet the following standards:[1]

(1) Primary responsibilities for emergency response by a nuclear facility licensee and by State and local organizations within the Emergency Planning Zones have been assigned, the emergency

[1] These standards are addressed by specific criteria in NUREG-0854; FEMA-REP-1 entitled "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants—For Interim Use and Comment" January 1980.

responsibilities of the various supporting organizations have been specifically established, and each principal response organization has staff to respond and to augment its initial response on the continuous basis.

(2) On-shift facility licensee responsibilities for emergency response are unambiguously defined, adequate staffing to provide initial facility accident response in key functional areas is maintained at all times, timely augmentation or response capabilities is available and the interfaces among various onsite response activities and offsite support and response activities are specified.

(3) Arrangements for requesting and effectively using assistance resources have been made, arrangements to accomodate State and locals staff at the licensee's near-site Emergency Operations Facility have been made, and other organizations capable of augmenting the planned response have been identified.

(4) A standard emergency classification and action level scheme, the bases of which include facility system and affluent parameters, is in use by the nuclear facility licensee, and State and local response plans call for reliance on information provided by facility licensees for determinations of minimum initial offsite response measures.

(5) Procedures have been established for notification, by the licensee, of State and local response organizations and for notification of emergency personnel by all organizations; the content of initial and followup messages to response organizations and the public has been established; and means to provide early notification and clear instruction to the populace within the plume exposure pathway Emergency Planning Zone have been established.

(6) Provisions exist for prompt communications among principal response organizations to emergency personnel and to the public.

(7) Information is made available to the public on a periodic basis on how they will be notified and what their initial actions should be in an emergency (e.g., listening to a local broadcast station and remaining indoors), the principal points of contact with the news media for dissemination of information during an emergency (including the physical location of locations) are established in advance, and procedures for coordinated dissemination of information to the public are established.

(8) Adequate emergency facilities and equipment to support the emergency response are provided and maintained.

(9) Adequate methods, systems, and equipment for assessing and monitoring actual or potential offsite consequences of a radiological emergency condition are in use.

(10) A range of protective actions have been developed for the plume exposure pathway EPZ for emergency workers and the public. Guidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place, and protective actions for the ingestion exposure pathway EPZ appropriate to the locale have been developed.

(11) Means for controlling radiological exposures, in an emergency, are established for emergency workers. The means for controlling radiological exposures shall include exposure guidelines consistent with EPA Emergency Worker and Lifesaving Activity Protective Action Guides.

(12) Arrangements are made for medical services for contaminated injured individuals.

(13) General plans for recovery and reentry are developed.

(14) Periodic exercises are (will be) conducted to evaluate major portions of emergency response capabilities, periodic drills are (will be) conducted to develop and maintain key skills, and deficiencies identified as a result of exercises or drills are (will be) corrected.

(15) Radiological emergency response training is provided to those who may be called on to assist in an emergency.

(16) Responsibilities for plan development and review and for distribution of emergency plans are established, and planners are properly trained.

(c)(1) Failure to meet the applicable standards set forth in paragraph (b) of this section may result in the Commission declining to issue an operating license; however, the applicant will have the opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

(2) Generally, the plume exposure pathway EPZ for nuclear power plants shall consist of an area of about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius. The exact size and configuration of the EPZs surrounding a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled nuclear reactors and for reactors with an authorized power level less than 250 MW thermal. The plans for the ingestion pathway shall focus on such actions as are appropriate to protect the food ingestion pathway.

(d) Notwithstanding the requirements of paragraphs (a) and (b) of this section, no NRC or FEMA review, findings, or determinations concerning the state of offsite emergency preparedness or the adequacy of and capability to implement State and local offsite emergency plans are required prior to issuance of an operating license authorizing only fuel loading and/or low power operations (up to 5% of the rated power). Insofar as emergency planning and preparedness requirements are concerned, a license authorizing fuel loading and/or low power operation may be issued after a finding is made by the NRC that the state of onsite emergency preparedness provides reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. The NRC will base this finding on its assessment of the applicant's emergency plans against the pertinent standards in paragraph (b) of this section and Appendix E of this Part.

Report, provided the change does not reduce the commitments in the program description previously accepted by the NRC. Changes to the quality assurance program description that do not reduce the commitments must be submitted to the NRC at least annually in accordance with the requirements of § 50.71 of this part. Changes to the quality assurance program description that do reduce the commitments must be submitted to NRC and receive NRC approval before implementation, as follows:

(i) Changes made to the Safety Analysis Report must be submitted for review to the appropriate NRC Regional Office shown in Appendix D of Part 20 of this chapter; to the Resident Inspector;

and to the Document Control Desk, U.S. Nuclear Regulatory Commission, Washington D.C. 20555. Changes made to NRC-accepted quality assurance topical report descriptions must be submitted to the Document Control Desk, U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, and to the NRC Region IV Vendor Program Branch.

(ii) The submittal of a change to the Safety Analysis Report quality assurance program description must include all pages affected by that change and must be accompanied by a forwarding letter identifying the change, the reason for the change, and the basis for concluding that the revised program incorporating the change continues to satisfy the criteria of Appendix B of this part and the Safety Analysis Report quality assurance program description commitments previously accepted by the NRC (the letter need not provide the basis for changes that correct spelling, punctuation, or editorial items).

(iii) A copy of the forwarding letter identifying the changes must be maintained as a facility record for three years.

(iv) Changes to the quality assurance program description included or referenced in the Safety Analysis Report shall be regarded as accepted by the Commission upon receipt of a letter to this effect from the appropriate reviewing office of the Commission or 60 days after submittal to the Commission, whichever occurs first.

(b) No right to the special nuclear material shall be conferred by the license except as may be defined by the license.

(c) Neither the license, nor any right thereunder, nor any right to utilize or produce special nuclear material shall be transferred, assigned, or disposed of in any manner, either voluntarily or involuntarily, directly or indirectly, through transfer of control of the license to any person, unless the Commission shall, after securing full information, find that the transfer is in full accordance with the provision of the act and give its consent in writing.

(d) The license shall be subject to suspension and to the rights of recapture of the material or control of the facility reserved to the Commission under section 108 of the act in a state of war or national emergency declared by Congress.

(e) The license shall be subject to revocation, suspension, modification, or amendment for cause as provided in the act and regula-

tions, in accordance with the procedures provided by the act and regulations.

(f) The license will at any time before expiration of the license, upon request of the Commission submit written statements, signed under oath or affirmation, to enable the Commission to determine whether or not the license should be modified, suspended or revoked.

(g) The issuance or existence of the license shall be deemed to waive, or relieve the licensee from compliance with, the antitrust laws, as specified in subsection 105a of the Act. In the event that the licensee should be found by a court of competent jurisdiction to have violated any provision of such antitrust laws in the conduct of the licensed activity, the Commission may suspend or revoke the license or take such other action with respect to it as shall be deemed necessary.

(h) The license shall be subject to the provisions of the Act now or hereafter in effect and to all rules, regulations, and orders of the Commission. The terms and conditions of the license shall be subject to amendment, revision, or modification, by reason of amendments of the Act or by reason of rules, regulations, and orders issued in accordance with the terms of the act.

(i) Except as provided in § 55.9 of this chapter, the licensee shall not permit the manipulation of the controls of any facility by anyone who is not a licensed operator or senior operator as provided in Part 55 of this chapter.

(i-1) Within three (3) months after issuance of an operating license, the licensee shall have in effect an operator requalification program which shall, as a minimum, meet the requirements of Appendix A of Part 55 of this chapter. Notwithstanding the provisions of § 50.59 the licensee shall not, except as specifically authorized by the Commission, make a change in an approved operator requalification program by which the scope, time allotted for the program or frequency in conducting different parts of the program is decreased.

Holders of operating licenses in effect September 17, 1973 shall implement an operator requalification program which, as a minimum, meets the requirements of Appendix A of Part 55 of this chapter which was submitted for approval by the Atomic Energy Commission.

(j) Apparatus and mechanisms other than controls, the operation of which may affect the reactivity or power level of a reactor shall be manipulated only with the knowledge and consent of an operator or senior operator licensed pursuant to Part 55 of this chapter present at the controls.

(k) An operator or senior operator licensed pursuant to Part 55 of this chapter shall be present at the controls at all times during the operation of the facility.

(l) The licensee shall designate individuals to be responsible for directing the licensed activities of licensed operators. These individuals shall be licensed a senior operators pursuant to Part 55 of this chapter.

(m) A senior operator licensed pursuant to Part 55 of this chapter shall be present at the facility or readily available on call at all times during its operation, and shall be present at the facility during initial start-up and approach to power, recovery from an unplanned or unscheduled shut-down or significant reduction in power, and refueling, or as otherwise prescribed in the facility license.

(n) The licensee shall not, except as authorized pursuant to a construction permit, make any alteration in the facility constituting a change from the technical specifications previously incorporated in a license or construction permit pursuant to § 50.36 of this part.

(o) Primary reactor containments for water cooled power reactors shall be subject to the requirements set forth in Appendix J to this part.

**§ 50.53 Jurisdictional limitations.**

No license under this part shall be deemed to have been issued for activities which are not under or within the jurisdiction of the United States.

**§ 50.54 Conditions of licenses.**

Whether stated therein or not, the following shall be deemed conditions in every license issued:

(a)(1) Each nuclear power plant or fuel reprocessing plant licensee subject to the quality assurance criteria in Appendix B of this part shall implement, pursuant to § 50.34(b)(6)(ii) of this part, the quality assurance program described or referenced in the Safety Analysis Report, including changes to that report.

(2) Each licensee described in paragraph (a)(1) of this section shall, by June 10, 1983, submit to the appropriate NRC Regional Office shown in Appendix D of Part 20 of this chapter the current description of the quality assurance program it is implementing for inclusion in the Safety Analysis Report, unless there are no changes to the description previously accepted by NRC. This submittal must identify changes made to the quality assurance program description since the description was submitted to NRC. (Should a licensee need additional time beyond June 10, 1983 to submit its current quality assurance program description to NRC, it shall notify the appropriate NRC Regional Office in writing, explain why additional time is needed, and provide a schedule for NRC approval showing when its current quality assurance program description will be submitted.)

(3) After March 11, 1983, each licensee described in paragraph (a)(1) of this section may make a change to a previously accepted quality assurance program description included or referenced in the Safety Analysis

(p) The licensee shall prepare and maintain safeguards contingency plan procedures in accordance with Appendix C of 10 CFR Part 73 for effecting the actions and decisions contained in the Responsibility Matrix of the safeguards contingency plan. The licensee may make no change which would decrease the effectiveness of a security plan prepared pursuant to § 50.34(c) or Part 73 of this chapter, or of the first four categories of information (Background, Generic Planning Base, Licensee Planning Base, Responsibility Matrix) contained in a licensee safeguards contingency plan prepared pursuant to § 50.34(d) or Part 73, as applicable, without prior approval of the Commission. A licensee desiring to make such a change shall submit an application for an amendment to his

license pursuant to § 50.90. The licensee may make changes to the security plan or to the safeguards contingency plan without prior Commission approval if the changes do not decrease the safeguards effectiveness of the plan. The licensee shall maintain records of changes to the plans made without prior Commission approval for a period of two years from the date of the change, and shall furnish to the Director of Nuclear Material Safety and Safeguards (for enrichment and reprocessing facilities) or to the Director of Nuclear Reactor Regulation (for nuclear reactors), U.S. Nuclear Regulatory Commission, Washington, D.C. 20555, with a copy to the appropriate NRC Regional Office specified in Appendix A of Part 73 of this chapter, a report containing a description of each change within two months after the change is made. Commencing on February 9, 1983, licensees in Regions I and II, and commencing on October 1, 1983 licensees in all regions shall furnish the report required by this paragraph to the Regional Administrator of the appropriate NRC Regional Office specified in Appendix A of Part 73 of this chapter, with a copy to the Director of Nuclear Material Safety and Safeguards (for enrichment and reprocessing facilities) or to the Director of Nuclear Reactor Regulation (for nuclear reactors). Prior to the safeguards contingency plan being put into effect, the licensee shall have:

(1) All safeguards capabilities specified in the safeguards contingency plan available and functional.

(2) Detailed procedures developed according to Appendix C to Part 73 available at the licensee's site, and

(3) All appropriate personnel trained to respond to safeguards incidents as outlined in the plan and specified in the detailed procedures.

The licensee shall provide for the development, revision, implementation, and maintenance of his safeguards contingency plan. To this end, the licensee shall provide for a review at least every 12 months of the safeguards contingency plan by individuals independent of both security program management and personnel who have direct responsibility for implementation of the security program. The review shall include a review and audit of safeguards contingency procedures and practices, an audit of the security system test-

ing and maintenance program, and a test of the safeguards system along with commitments established for responses by local law enforcement authorities. The results of the review and audit, along with recommendations for improvements, shall be documented, reported to the licensee's corporate and plant management, and kept available at the plant for inspection for a period of two years.

(q) A licensee authorized to possess and/or operate a nuclear power reactor shall follow and maintain in effect emergency plans which meet the standards in § 50.47[b] of this part and the requirements in Appendix E to this Part. A licensee authorized to possess and/or operate a research reactor or a fuel facility shall follow and maintain in effect emergency plans which meet the requirements in Appendix E of this part. The nuclear power reactor licensee may make changes to these plans without Commission approval only if such changes do not decrease the effectiveness of the plans and the plans, as changed, continue to meet the standards of §§ 50.47[b] of this part and the requirements of Appendix E of this Part. The research reactor licensee and/or the fuel facility licensee may make changes to these plans without Commission approval only if such changes do not decrease the effectiveness of the plans and the plans, as changed, continue to meet the requirements of Appendix E of this part. Proposed changes that decrease the effectiveness of the approved emergency plans shall not be implemented without application to and approval by the Commission. The licensee shall furnish one copy of each proposed change for approval to Administrator of the appropriate NRC Regional Office specified in Appendix D of Part 20 of this chapter and two copies to the Document Control Desk, U.S. Nuclear Regulatory Commission, Washington, DC 20555. If a change is made without approval, the licensee shall furnish one copy to the Administrator of the appropriate NRC Regional Office specified in Appendix D of Part 20 of this chapter and two copies of the Document Control Desk, U.S. Nuclear Regulatory Commission, Washington, DC 20555 within 30 days after the change is made.

(r) Each licensee who is authorized to possess and/or operate a research or test reactor facility with an authorized power level greater than or equal to 2 MW thermal, under a licensee of the type specified in § 50.21(c), shall submit emergency plans complying

with 10 CFR Part 50, Appendix E, to the Director of the Office of Nuclear Reactor Regulation for approval by September 7,1982. Each licensee who is authorized to possess and/or operate a research or test reactor facility with an authorized power level less than 2 MW thermal, under a license of the type specified in § 50.21(c), shall submit emergency plans complying with 10 CFR Part 50, Appendix E, to the Director of the Office of Nuclear Reactor Regulation for approval by November 3, 1982.

(s)(1) Each licensee who is authorized to possess and/or operate a nuclear power reactor shall submit to NRC within 60 days of the effective date of this amendment the radiological emergency response plans of State and local governmental entities in the United States that are wholly or partially within a plume exposure pathway EPZ, as well as the plans of State governments wholly or partially within an ingestion pathway EPZ.[1] [2]

Ten (10) copies of the above plans shall be forwarded to the Director of Nuclear Reactor Regulation with 3 copies to the Director of the appropriate NRC regional office. Generally, the plume exposure pathway EPZ for nuclear power reactors shall consist of an area about 10 miles (16 km) in radius and the ingestion pathway EPZ shall consist of an area about 50 miles (80 km) in radius. The exact size and configuration of the EPZs for a particular nuclear power reactor shall be determined in relation to local emergency response needs and capabilities as they are affected by such conditions as demography, topography, land characteristics, access routes, and

[1] Emergency Planning Zones (EPZs) are discussed in NUREG-0396; EPA 520/1-78-016, "Planning Basis for the Development of State and Local Government Radiological Emergency Response Plans in Support of Light Water Nuclear Power Plants," December 1978.

[2] If the State and local emergency response plans have been previously provided to the NRC for inclusion in the facility docket, the applicant need only provide the appropriate reference to meet this requirement.

jurisdictional boundaries. The size of the EPZs also may be determined on a case-by-case basis for gas-cooled nuclear reactors and for reactors with an authorized power level less than 250 MW thermal. The plans for the ingestion pathway EPZ shall focus on such actions as are appropriate to protect the food ingestion pathway.

(2)(i) For operating power reactors, the licensee, State, and local emergency response plans shall be implemented by April 1, 1981, except as provided in Section IV.D.3 of Appendix E to this part.

(ii) If after April 1, 1981, the NRC finds that the state of emergency preparedness does not provide reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency *(including findings based on requirements of Appendix E, Section IV.D.3)* and if the deficiencies *(including deficiencies based on requirements of Appendix E, Section IV.D.3.)* are not corrected within four months of that finding, the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate. In determining whether a shutdown or other enforcement action is appropriate, the Commission shall take into account, among other factors, whether the licensee can demonstrate to the Commission's satisfaction that the deficiencies in the plan are not significant for the plant in question, or that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons for continued operation.

(3) The NRC will base its finding on a review of FEMA findings and determinations as to whether State and local emergency plans are adequate and capable of being implemented, and on the NRC assessment as to whether the licensee's emergency plans are adequate and capable of being implemented. Nothing in this paragraph shall be construed as limiting the authority of the Commission to take action under any other regulation or authority of the Commission or at any time other than that specified in this paragraph.

(t) A nuclear power reactor licensee shall provide for the development, revision, implementation, and maintenance of its emergency preparedness program. To this end, the licensee shall provide for a review of its emergency preparedness program at least every 12 months by persons who have no direct responsibility for implementation of the emergency preparedness program. The review shall include an evaluation for adequacy of interfaces with State and local governments and of licensee drills, exercises, capabilities, and procedures. The results of the review, along with recommendations for improvements, shall be documented, reported to the licensee's corporate and plant management, and retained for a period of five years. The part of the review involving the evaluation for adequacy of interface with State and local governments shall be available to the appropriate State and local governments.

(u) Within 60 days after the effective date of this amendment, each nuclear power reactor licensee shall submit to the NRC plans for coping with emergencies that meet standards in § 50.47(b) and the requirements of Appendix E to this part.

(v) Each licensee subject to the requirements of Part 73 of this chapter shall ensure that physical security, safeguards contingency and guard qualification and training plans and other related Safeguards Information are protected against unauthorized disclosure in accordance with the requirements of § 73.21 of this chapter, as appropriate.

(w) Each electric utility licensee under this part for a production or utilization facility of the type described in § 50.21(b) or § 50.22 shall, by June 29, 1982, take reasonable steps to obtain onsite property damage insurance available at reasonable costs and on reasonable terms from private sources or to demonstrate to the satisfaction of the Commission that it possesses an equivalent amount of protection covering the facility, *Provided*, that:

(1) This insurance must have a minimum coverage limit no less than the combined total of (i) that offered by either American Nuclear Insurers (ANI) and Mutual Atomic Energy Reinsurance Pool (MAERP) jointly or Nuclear Mutual Limited (NML); plus (ii) that offered by Nuclear Electric Insurance Limited (NEIL), the Edison Electric Institute (EEI), ANI, and MAERP jointly, NML as excess property insurance;

(2) The licensee shall, within ninety (90) days of any increases in policy limits for primary or excess coverage that it has obtained pursuant to this paragraph, take reasonable steps to obtain these increases; and

(3) When a licensee is prohibited from purchasing on-site property damage insurance because of state or local law, the licensee shall purchase the specific amount of such insurance found by the NRC to be reasonably available to that licensee, or to obtain an equivalent amount of protection; and

(4) The licensee shall report on April 1 of each year to the NRC as to the present levels of this insurance or financial protection it maintains and the sources of this insurance or protection.

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No. 83-329

# In the Supreme Court of the United States

OCTOBER TERM, 1983

COUNTY OF ROCKLAND, PETITIONER

*v.*

NUCLEAR REGULATORY COMMISSION, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the court of appeals correctly dismissed petitioner's petition for review for lack of jurisdiction.

2. Whether the Nuclear Regulatory Commission acted reasonably and in accordance with its regulations in declining to take enforcement action for deficiencies in emergency preparedness at the Indian Point nuclear power plants.

## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions below | 1 |
| Jurisdiction | 1 |
| Statute and regulation involved | 2 |
| Statement | 2 |
| Argument | 7 |
| Conclusion | 10 |
| Appendix | 1a |


## TABLE OF AUTHORITIES

Cases:


*American Trucking Associations, Inc.* v. *ICC*, 673 F.2d 82, cert. denied, No. 82-86 (Mar. 7, 1983) ..... 7

*Cross-Sound Ferry Services, Inc.* v. *United States*, 573 F.2d 725 ..... 8-9

*Gage* v. *AEC*, 479 F.2d 1214 ..... 7

*Mobil Oil Corp.* v. *FPC*, 417 U.S. 283 ..... 9

*Nader* v. *NRC*, 513 F.2d 1045 ..... 7

*Universal Camera Corp.* v. *NLRB*, 340 U.S. 474 ..... 9

Page

Statutes and regulations:

28 U.S.C. 2344 ..... 2, 6, 7

28 U.S.C. 2348 ..... 7

42 U.S.C. 2239 ..... 7

10 C.F.R. :

Section 2.206 ..... 4

Section 50.54(s)(2)(ii) ..... 2, 4, 6, 8

# In the Supreme Court of the United States

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## BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A23) is reported at 709 F.2d 766. The December 22, 1982 decision of the Nuclear Regulatory Commission (Pet. App. A24-A41) is reported at 16 N.R.C. 1698. The February 2, 1983 decision of the Commission (App., *infra*, 1a-3a) is not yet reported.

### JURISDICTION

The judgment of the court of appeals was entered on May 27, 1983. The petition for a writ of certiorari was filed on August 25, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE AND REGULATION INVOLVED

1. 28 U.S.C. 2344 provides in pertinent part:

> On the entry of a final order reviewable under this chapter, the agency shall promptly give notice thereof by service or publication in accordance with its rules. Any party aggrieved by the final order may, within 60 days after its entry, file a petition to review the order in the court of appeals wherein venue lies. * * *

2. 10 C.F.R. 50.54(s)(2)(ii) is set forth at Pet. App. A53.

## STATEMENT

Petitioner seeks review of the decision of the Nuclear Regulatory Commission (NRC), dated December 22, 1982, refusing to take immediate enforcement action with respect to preparedness for radiological emergencies at the Indian Point Unit 2 and 3 nuclear power plants in Buchanan, New York.

1. The Commission's rules provide that when the NRC finds that the status of emergency preparedness at an operating nuclear power plant does not provide reasonable assurance of adequate protective measures in the event of a radiological emergency, the Commission is to notify the licensee that, unless deficiencies are corrected within a four-month period (which is commonly referred to as the "120-day clock"), the Commission will determine whether the reactor shall be shut down, or other action taken, pending completion of the corrective actions. 10 C.F.R. 50.54(s)(2)(ii) (Pet. App. A53). The order challenged in the present case involves the implementation of these rules, which became effective on April 1, 1981.

In March 1981, in the course of preparing to implement the new rules, the NRC asked the Federal Emergency Management Agency (FEMA) for its findings and determinations on state and local offsite emergency plans for Indian Point. On April 23, 1981, FEMA responded that it found

two major problem areas in state and local planning for all five nuclear reactors located in New York State: (1) a conflict in organizational relationships and the assignment of responsibilities for emergency management, which was in part the result of an ambiguity in state law; and (2) a lack of specificity in the plans. The NRC informed the licensees that unless these deficiencies were corrected within 120 days, the NRC would determine whether to shut the facilities down or take other enforcement action. Pet. App. A10, A25.

Soon thereafter, the New York Legislature eliminated the ambiguity in state law by providing that primary responsibility in the event of a radiological emergency lies with county authorities. In August 1981, shortly before the "120-day clock" was to expire, FEMA reported to NRC that its earlier concerns had been partially answered by the new legislation, and that "the present state of planning is generally adequate to carry out the responsibilities of the State and local governments in the case of an accident at these sites" (II R.17). Accordingly, the NRC staff advised the nuclear licensees in New York that, on the basis of FEMA's evaluation, it contemplated no enforcement action at that time (Pet. App. A10).

On March 3, 1982, FEMA conducted an exercise at Indian Point to test the adequacy of onsite and offsite preparedness for radiological emergencies. On May 18, 1982, the legislature of Rockland County — a county which in part lies within the 10-mile emergency planning zone surrounding the Indian Point units — enacted a resolution (1) declaring that the County would not cooperate in emergency planning and emergency exercises for Indian Point; and (2) barring County personnel from offering any assistance to federal agencies working to assure preparedness for radiological emergencies at the Indian Point plants. III R.3.

On August 2, 1982, FEMA informed the NRC that there were significant deficiencies in emergency preparedness at the Indian Point plants. FEMA's evaluation was based, inter alia, on its review of the radiological emergency response plans of New York State and the counties surrounding the plant, including Rockland; of the performance of those jurisdictions during the March 3 emergency exercise; and on the Rockland County Legislature's resolution of noncooperation. On the following day, the Commission notified the Indian Point licensees that, unless the significant deficiencies identified by FEMA were corrected within 120 days, the NRC would consider whether to shut the plants down or take other enforcement action. Pet. App. A11, A26.

One day later, on August 4, 1982, the Union of Concerned Scientists (UCS) and the New York Public Interest Research Group (NYPIRG) wrote to the Commission requesting an order for the immediate shutdown of the Indian Point plants. The Commission referred the UCS/NYPIRG request to the Director, Office of Inspection and Enforcement, for treatment as a petition under 10 C.F.R. 2.206.[1] On November 26, 1982, the Director denied the UCS/NYPIRG request (see App., *infra*, 1a).

Thereafter, on December 22, 1982, the Commission issued a decision concluding, pursuant to 10 C.F.R. 50.54(s)(2)(ii), that no shutdown or other enforcement action was necessary with respect to Indian Point Unit 2 in the few months that would elapse before corrective actions

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[1] 10 C.F.R. 2.206 provides in pertinent part:

> (a) Any person may file a request for the * * * Director, Office of Inspection and Enforcement * * * to institute a proceeding pursuant to § 2.202 to modify, suspend or revoke a license, or for such other action as may be proper. * * *

were scheduled to be completed (Pet. App. A24-A41).[2] In determining that the planning standard deficiencies noted by FEMA did not warrant immediate shutdown, the Commission relied in part on FEMA's conclusion that remedial actions that had been undertaken and those scheduled for the next few months "constitute offsite plans that will be feasible and capable of implementation" (*id.* at A29). In addition, the Commission stated that it would continue to monitor the progress of corrective actions, noting that FEMA would be conducting an emergency exercise in March 1983 (*id.* at A30). The Commission stated that it would revisit the status of emergency planning after receiving FEMA's post-exercise report (*ibid.*).[3]

On February 2, 1983, the Commission issued a further order adopting the December 22 decision as its response to the August 4, 1982 NYPIRG/UCS request for shutdown (App., *infra*, 1a-3a).

2. Prior to the issuance of the February order, petitioner filed in the court of appeals a petition for review of the Commission's December 22, 1982 order. In March 1983, NYPIRG and UCS filed their own joint petition for review of the February 2 denial of their shutdown request. The petitions for review were consolidated by the court of appeals.

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[2]Unit 3 was not expected to operate during this period for other reasons (Pet. App. A29).

[3]FEMA conducted the emergency exercise on March 9, 1983. On April 20, based on its observation of the exercise and evaluation of planning documents, FEMA briefed the Commission concerning its assessment of preparedness. In an order dated June 10, the Commission concluded that adequate interim compensatory actions had been taken and that shutdown of the plants was not warranted. That order is presently being challenged by petitioner in the D.C. Circuit (*County of Rockland* v. *NRC*, No. 83-1837). In its petition for review, Rockland County is also challenging the December 1982 order of the NRC at issue here.

Rockland County and the other petitioners in the court of appeals argued that the Commission, in its December 22 and February 2 orders, had failed to follow its emergency preparedness regulations (1) by considering factors other than those explicitly listed in 10 C.F.R. 50.54(s)(2)(ii), and (2) by declining to take enforcement action in the absence of a conclusion that overall emergency preparedness was adequate. They also argued that the Commission had an insufficient basis in fact to conclude, pursuant to Section 50.54(s)(2)(ii), that there were adequate interim compensatory measures, that the deficiencies were insignificant, or that there were compelling reasons for continued operation of the Indian Point plants.

The court of appeals dismissed Rockland County's petition for review for lack of jurisdiction and denied the petition of NYPIRG and UCS on the merits (Pet. App. A1-A23). The court noted that Rockland County had failed to participate in the December 1982 proceedings before the Commission and had failed to seek administrative review of the NRC's December 1982 order. The court concluded that, because Rockland County was not a "party" to the agency proceedings under review, it failed to satisfy the jurisdictional requirements of 28 U.S.C. 2344. Pet. App. A16-A18.

Turning to the merits of the petition for review filed by NYPIRG and UCS, the court concluded that the Commission has considerable latitude in identifying the pertinent factors for deciding whether to take enforcement action, including factors not explicitly listed in 10 C.F.R. 50.54(s)(2)(ii), and also in determining whether those factors have been satisfied (Pet. App. A21-A22). The court then ruled that the Commission's December 1982 decision was not irrational in its assessment of the FEMA reports or in its conclusion that enforcement action was inappropriate. The court refused to substitute its judgment for that of the Commission, concluding that "no convincing evidence"

had been presented "to discredit the factual findings and conclusion reached by the Commission" (*id.* at A22-A23).

**ARGUMENT**

The decision of the court of appeals is correct, does not conflict with the decision of any other court, and does not warrant review.

1. Petitioner contends (Pet. 7-8) that the court of appeals erred in dismissing its petition for lack of jurisdiction. This contention is frivolous. As the court of appeals observed (Pet. App. A16-A17), 28 U.S.C. 2344 provides that "[a]ny *party* aggrieved by the final order [of an agency] may * * * file a petition to review the order in the [appropriate] court of appeals" (emphasis added). Petitioner, as a "person whose interest may be affected" by the NRC proceedings, could have been admitted to those proceedings "as a party." See 42 U.S.C. 2239. Because petitioner did not participate (or even seek to participate) in the proceedings before the NRC, petitioner plainly is not a "party" entitled to judicial review within the meaning of the statute. See *American Trucking Associations, Inc.* v. *ICC*, 673 F.2d 82, 84 (5th Cir. 1982), cert. denied, No. 82-86 (Mar. 7, 1983); *Gage* v. *AEC*, 479 F.2d 1214, 1217-1221 (D.C. Cir. 1973). See also *Nader* v. *NRC*, 513 F.2d 1045, 1054-1055 (D.C. Cir. 1975).[4] Accordingly, the court of appeals properly held that it lacked jurisdiction to consider Rockland County's petition for review under 28 U.S.C. 2344.

2. In any event, the court of appeals properly upheld the NRC's decision declining to take enforcement action despite finding deficiencies in emergency preparedness at

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[4]We note that petitioner also could have sought leave to intervene in the UCS/NYPIRG review proceeding in the court of appeals. See 28 U.S.C. 2348. Petitioner, however, did not do so.

Indian Point, and this issue clearly is not of sufficient general importance to warrant this Court's review. To begin with, the decision below turned, not on any question of statutory construction, but on the NRC's interpretation and application of its own regulations, regulations that have been invoked only three times since their promulgation in 1981. Moreover, petitioner does not assert any conflict between the court of appeals' decision and the decision of any other court. Thus, this case does not represent a suitable occasion for this Court's exercise of its certiorari jurisdiction.

Petitioner's claims relate principally to the factors used by the Commission to assess the advisability of enforcement action for emergency preparedness deficiencies, and to the application of those factors to the Indian Point situation. Petitioner argues that the Commission acted arbitrarily and capriciously in basing its determination, inter alia, on the conclusion that "the remaining problems would likely be corrected within a short period of time" (Pet. App. A21). But the NRC regulation at issue, 10 C.F.R. 50.54(s)(2)(ii), authorizes the Commission to consider, "*among other factors*," whether "adequate interim compensating actions have been *or will be taken promptly*" (Pet. App. A53; emphasis added). In view of this language, which petitioner does not challenge as inconsistent with the Commission's statutory mandate, the court of appeals correctly declined to place "unwarranted restrictions" on the Commission's decisionmaking process (Pet. App. A21).

In its review of the substance of the Commission's decision, the court of appeals observed that "[t]he test here is primarily one of rationality. If the Commission based its order on substantial relevant evidence, fairly ascertained, and if it has made no clear error of judgment, this court is not authorized to overturn that order" (Pet. App. A22, quoting *Cross-Sound Ferry Services, Inc.* v. *United States*,

573 F.2d 725, 730 (2d Cir. 1978)). Applying this test, the court held that the Commission's decisions "were not irrational," that there was "substantial evidence in the record to support the Commission's decision," and that it would not substitute its judgment for the Commission's (Pet. App. A22-A23).

The court's ruling, affirming a Commission decision that was fully articulated and based on the administrative record, reflects a sound evaluation of the relevant law and facts. Petitioner, in effect, is asking this Court to weigh once again the facts already weighed by the Commission and the court of appeals and to reach a different conclusion. This Court has stated, however, that it will intervene for such a purpose "only in what ought to be the rare instance when the standard appears to have been misapprehended or grossly misapplied." *Mobil Oil Corp.* v. *FPC*, 417 U.S. 283, 310 (1974), quoting *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 491 (1951). Petitioner does not, and could not, argue here that the court of appeals misunderstood or grossly misapplied the applicable standards for judicial review. Petitioner argues only that the court of appeals should have reached a different conclusion. This claim does not merit this Court's intervention.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1983

DOJ-1983-10

## APPENDIX

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Victor Gilinsky
John F. Ahearne
Thomas M. Roberts
James K. Asselstine

| | | |
|---|---|---|
| In the Matter of | | |
| CONSOLIDATED EDISON CO. OF NEW YORK, INC., and the POWER AUTHORITY OF THE STATE OF NEW YORK | | Docket Nos. 50-247 50-286 |
| (Indian Point, Units 2 and 3) | | |

### ORDER

On November 26, 1982 the Director of the Office of Inspection and Enforcement issued DD-82-12, which denied an August 4, 1982 petition from the Union of Concerned Scientists (UCS) for immediate shutdown of Indian Point, Units 2 and 3. UCS argued that shutdown was required because of deficiencies in emergency preparedness identified by the Federal Emergency Management Agency in a letter to the NRC staff dated August 2, 1982. On August 3, 1982 the NRC staff notified the licensees for the Indian Point units that, pursuant to 10 CFR 50.54(s)(2)(ii), it was initiating a "120-day clock"; at the end of this period, if the

deficiencies were not cured, the Commission would decide whether to take enforcement action. In November 1982 the Commission decided to make that determination itself, and on December 23, 1982, the Commission issued such a decision, CLI-82-38.

CLI-82-38 represents the Commission's views on the present need for enforcement action with regard to the emergency preparedness situation at Indian Point. As such, it supersedes the earlier enforcement decision by the Director. In view of CLI-82-38 and of subsequent events, the Commission believes that review of DD-82-12 would serve no useful purpose. Thus we decline to review the Director's Decision. The separate views of Commissioner Asselstine are attached.

It is so ORDERED.

For the Commission*

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, DC,
this 2nd day of February, 1983.

*Commissioner Gilinsky did not participate in this decision.

## ADDITIONAL VIEWS OF COMMISSIONER ASSELSTINE

For the reasons set forth in my dissenting opinion to the Commission's December 23, 1982 decision (CLI-82-38), I would have taken further enforcement action in the form of a show cause order for the continued operation of the Indian Point plants. However, I agree that the Commission majority's position in that decision supercedes [sic] the earlier enforcement decision by the Director of the Office of Inspection and Enforcement.

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IN THE

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October Term, 1983

COUNTY OF ROCKLAND,
*Petitioner,*

*v.*

U.S. NUCLEAR REGULATORY COMMISSION and THE UNITED STATES OF AMERICA,
*Respondents,*

POWER AUTHORITY OF THE STATE OF NEW YORK and CONSOLIDATED EDISON COMPANY OF NEW YORK, INC.,
*Intervenors-Respondents,*

NEW YORK PUBLIC INTEREST RESEARCH GROUP, INC. and UNION OF CONCERNED SCIENTISTS,
*Intervenors-Petitioners.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF INTERVENORS-RESPONDENTS IN OPPOSITION

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# TABLE OF CONTENTS


| | PAGE |
|---|---|
| Table of Authorities | II |
| Parties | 2 |
| Statement of the Case | 3 |
| Reasons Why Certiorari Should Not Be Granted | 8 |
| Conclusion | 11 |
| Appendix A | 1a |

## TABLE OF AUTHORITIES

PAGE

***Cases:***

United States v. Johnston, 268 U.S. 220 (1925) ..... 10

County of Rockland v. U.S. Nuclear Regulatory Commission, 709 F.2d 766 (2d Cir. 1983) ..... 7, 8, 10

***Administrative Decisions:***

Consolidated Edison Co. of New York, Inc., and the Power Authority of the State of New York (Indian Point Units 2 and 3), CLI-82-38, 16 NRC 1698 (1982) ..... 6

***Statutes:***

N.Y. Exec. Law Sections 20-22 (McKinney 1982) ..... 4

N.Y. Pub. Auth. Law Section 1001 *et seq.* (McKinney 1982) ..... 2

***Regulations:***

10 C.F.R.:

Part 2 ..... 4
Section 2.206 ..... 6
Part 50 ..... 3
Part 50, Appendix E ..... 3
Section 50.47 ..... 3
Section 50.54(q) ..... 3
Section 50.54(s)(1) ..... 3, 4
Section 50.54(s)(2) ..... 4
Section 50.54(s)(2)(ii) ..... 6, 7, 8, 9, 10

***Rules:***

Sup. Ct. R. 17 ..... 10
Sup. Ct. R. 28 ..... 1a

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*Intervenors-Petitioners.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF INTERVENORS-RESPONDENTS IN OPPOSITION

This brief is submitted by Intervenors-Respondents Power Authority of the State of New York and Consolidated Edison Company of New York, Inc., in opposition to the petition for a writ of certiorari of the County of Rockland. For the reasons set forth below, no good grounds have been set forth for the granting of the petition.

## Parties

Intervenor-Respondent Power Authority of the State of New York ("Power Authority") is a corporate municipal instrumentality of the State of New York, a political subdivision of the State exercising governmental and public powers, existing to provide a continuous, adequate and low-cost supply of dependable electric power and energy for the benefit of the people of the State of New York. N.Y. Pub. Auth. Law § 1001 *et seq.* (McKinney 1982). The Power Authority owns and operates a nuclear power plant known as the Indian Point 3 Nuclear Power Plant, located in Buchanan, New York. The Power Authority is licensed and subject to regulation by respondent United States Nuclear Regulatory Commission ("NRC"), and holds NRC Facility Operating License No. DPR-64.

Intervenor-Respondent Consolidated Edison Company of New York, Inc. ("Con Edison") is a public utility corporation principally engaged in the generation and transmission of electric power in the southeastern region of the State of New York. Con Edison owns and operates a nuclear power plant known as the Indian Point Station, Unit No. 2, also in Buchanan, New York. Con Edison is also licensed and subject to regulation by respondent NRC and holds Facility Operating License No. DPR-26.

Respondent NRC is the federal government agency charged with licensing and regulatory functions related to the possession, use, and production of nuclear energy.

Petitioner Rockland County is a county located in part within a ten mile radius of the Indian Point nuclear power plants.

## Statement of the Case

This case originated as a challenge by a local government to an order of respondent NRC issued under its regulations controlling radiological emergency planning in the vicinity of nuclear power plants. The NRC had found, and stated in its order, that there were no good grounds for issuance of an order terminating operation of the Indian Point nuclear power plant Units 2 and 3 because of the status of offsite radiological emergency planning by the State of New York and various local governments surrounding the Indian Point site.

Emergency planning at Indian Point, as at other nuclear plants, is governed by the provisions of 10 C.F.R. Part 50. Title 10 C.F.R. § 50.54(q) requires all licensed operators of nuclear power reactors to follow and maintain emergency plans which meet NRC regulations contained in 10 C.F.R. § 50.47, and 10 C.F.R. Part 50, Appendix E. These regulations, which took effect on November 3, 1980, created an entirely new framework within which state and local governments must prepare for virtually any offsite radiological contingency, regardless of its remote probability.

The development and application of the new NRC emergency planning regulations leaves no doubt that emergency planning is a dynamic process which affected governments are required to implement in stages. The first stage of the process is the submission of revised emergency planning documents to the NRC. These documents include response plans of State and local county governments. (10 C.F.R. § 50.54(s)(1).)

Under New York State law, responsibility for the preparation of the State's and counties' plans for disaster preparedness falls upon the State Disaster Preparedness Commission (the "State Commission"). N.Y. Exec. Law §§ 20-22 (McKinney 1982). Pursuant to 10 C.F.R. § 50.54(s)(1), in December 1980, Intervenors-Respondents submitted on-site emergency response plans, together with draft radiological emergency plans of the State and the four counties with territory within a ten mile radius of the Indian Point site, including Petitioner Rockland County.

NRC regulation 10 C.F.R. § 50.54(s)(2) provides that in the event that deficiencies appear in an NRC licensee's emergency plans, including compliance of state and local governmental plans with federal regulations, a four-month period may be allowed for their correction. This four-month period is commonly referred to as the "120-day clock." If at the expiration of the "120-day clock" deficiencies remain, the NRC may institute enforcement action pursuant to 10 C.F.R. Part 2. An order shutting the plant down is one of many enforcement options, but contrary to Petitioner's suggestion is by no means required.

In April 1981, the NRC transmitted to Intervenors-Respondents a deficiency notice regarding the State's and four counties' offsite radiological emergency plans for Indian Point. The NRC's primary concern was with a "conflict between State and county authorities and responsibilities pertaining to radiological emergency preparedness" which was said to "pervade" the plan. Accordingly, in April 1981, the NRC initiated its first "120-day clock." During that period, comprehensive State legislation was enacted which addressed the NRC's concern regarding the conflict among governmental authorities, as well as other radio-

logical emergency preparedness matters. The NRC found this response satisfactory and allowed the "120-day clock" to expire without taking enforcement action. In July and August 1981, the State of New York applied to the Federal Emergency Management Agency ("FEMA") for formal approval of the State and county emergency plans for the Indian Point area. These plans were, and continue to be, approved by the Governor's designee, the Chairman of the State Commission.

As a part of the next stage, in March 1982, the State and four counties held the first full-scale, offsite emergency planning exercise under the revised regulations. While the exercise was successful in most respects, and the NRC found that onsite preparedness was adequate, FEMA made "interim findings," dated July 30, 1982, which advised the NRC of various deficiencies in offsite emergency planning which had surfaced during the exercise. One of the deficiencies cited by FEMA was the failure of Rockland County to participate adequately in the emergency planning process. On August 3, 1982, the NRC initiated a new "120-day clock."

Intervenors-Respondents, FEMA, and the various governmental units involved undertook a major effort during the second 120-day period to address the alleged specific deficiencies cited by FEMA. Shortly after the expiration of the "120-day clock," FEMA provided the NRC with an "update" of its "interim findings" (the "FEMA Interim Update"). In its interim update, which noted only two remaining deficiencies, FEMA commented favorably upon the improvements made in the 120-day period, provided an interim item-by-item report, and stated that the next

element in FEMA's review process would be "an evaluation of preparedness by FEMA at an exercise to be held in March 1983."

In December 1982, after reviewing the FEMA findings, the NRC considered whether it would be appropriate to institute enforcement action at that time. On December 23, 1982, the NRC issued an order concluding that enforcement action would be inappropriate and unnecessary. The NRC stated that:

> Our regulations allow but do not mandate immediate shutdown of the Indian Point units. We rejected a mandatory shutdown formulation when we adopted what is now 10 CFR 50.54(s)(2)(ii). *See* 44 Fed. Reg. 75171 (12/19/79); 45 Fed. Reg. 50705-07 (7/31/80). We do not believe that the two planning standard deficiencies noted by FEMA warrant immediate shutdown.
>
> Accordingly, we have decided that no enforcement action is required at this time. However, the Commission will continue to monitor the progress that is made.

*Consolidated Edison Co. of New York, Inc., and the Power Authority of the State of New York* (Indian Point Units 2 and 3), CLI-82-38, 16 NRC 1698, 1703 (1982). As required by 10 C.F.R. § 50.54(s)(2)(ii), the NRC balanced several factors, including: whether the deficiencies were significant for the plant in question; whether adequate interim compensating actions had been or will be taken promptly; and whether there were other compelling reasons for continued operation.

In January 1983, without having attempted pursuant to 10 C.F.R. § 2.206 to have the NRC review its December 23

Order, Petitioner Rockland County filed a petition for review of the NRC order in the United States Court of Appeals for the Second Circuit. Soon afterward, the New York Public Interest Research Group and the Union of Concerned Scientists ("NYPIRG-UCS") intervened and joined Rockland as petitioners. Petitioners asserted before the Court of Appeals as grounds for reversal of the Commission's determination that the Commission had failed to follow its own regulations and abused its discretion in declining to take enforcement action against the licensees to correct emergency planning deficiencies.

On May 27, 1983, the Court of Appeals for the Second Circuit emphasized in its decision that the applicable regulations gave "considerable latitude" to the Commission in connection with possible enforcement action to consider the relative significance of the deficiencies, whether adequate interim compensating measures had been or were to be taken promptly, and whether there were additional compelling reasons for continued operation. 10 C.F.R. § 50.54 (s)(2)(ii); *County of Rockland* v. *U.S. Nuclear Regulatory Commission,* 709 F.2d 766, 776 (2d Cir. 1983). Reviewing the record, the Court of Appeals found that:

> In this case, the Commission considered, among other factors, that substantial progress had been made to correct deficiencies at Indian Point, that the remaining problems would likely be corrected within a short period of time and that the likelihood of a severe nuclear accident in the intervening, "correction period" was extremely remote.

*Rockland,* 709 F.2d at 776. The Court found that all such factors could permissibly be considered by the Commission,

and rejected petitioners' argument that agency regulations had not been adequately followed.

Petitioners' second argument was that the Commission had acted arbitrarily and capriciously, and abused its discretion, by failing to take enforcement action. Pointing out that the arbitrary and capricious review standard was "narrow" and "highly deferential" to the agency action, the Second Circuit concluded that the Commission's decision was supported by substantial evidence in the record. Stating that "[w]e will not substitute our judgment for that of the Commission," the Court denied the petition for review. *Id.* at 777.

The review petition of Rockland County was also rejected by the Court of Appeals because of the County's failure to exhaust administrative remedies before the NRC. In this regard the Court stated that "the county could have participated in the December 1982 Commission proceedings and would have been entitled to party status for purposes of appeal. Alternatively, Rockland could have filed a section 2.206 petition challenging the December 1982 order and could have appealed in this forum if the Commission refused to grant its petition. . . ." *Id.* at 774.

## Reasons Why Certiorari Should Not Be Granted

The argument of Rockland County in support of certiorari is wholly independent of the relevant NRC regulation, 10 C.F.R. § 50.54(s)(2)(ii). This regulation provides that:

> If after April 1, 1981, the NRC finds that the state of emergency preparedness does not provide *reasonable*

> *assurance* that adequate protective measures can and will be taken in the event of a radiological emergency . . . and if the deficiencies . . . are not corrected within four months of that finding, *the Commission will determine whether the reactor shall be shut down until such deficiencies are remedied or whether other enforcement action is appropriate.* In determining whether a shutdown or other enforcement action is appropriate, the Commission shall take into account, among other factors, whether the licensee can demonstrate to the Commission's satisfaction that the deficiencies in the plan are not significant for the plant in question, or that adequate interim compensating actions have been or will be taken promptly, or that there are other reasons for continued operation. (Emphasis supplied).

Although Petitioner claims that the Commission was required under this regulation to find that adequate protective measures can and will be taken in the event of a radiological emergency, it is plain from 10 C.F.R. § 50.54(s)(2)(ii) that the Commission was entitled to weigh the significance of deficiencies in the plans, to assess the adequacy of interim compensating actions, and to consider whether there were other compelling reasons for continued operation.

It is not disputed and the record clearly reflects that the Commission did this. At the end of this process, the Commission concluded that no enforcement action was necessary or appropriate at that time. The Commission relied upon the following factors in arriving at its decision: substantial progress had been made to correct deficiencies at Indian Point; the remaining problems would likely be corrected within a short period of time; and the likelihood of a severe nuclear accident in the intervening period was extremely remote. Thus, measured against the requirements

of 10 C.F.R. § 50.54(s)(2)(ii), the NRC's decision was manifestly rational and not arbitrary in any manner. The Court of Appeals noted that petitioners "have offered no convincing evidence to discredit the factual findings and conclusion reached by the Commission," *Rockland*, 709 F.2d at 777.

The balance of the petition for certiorari consists of Petitioner's own analysis and application of Commission regulations controlling enforcement. However, it is well established that the standard for review is not whether other fact-finders could have reached a contrary result. Precedent set by this Court provides that "[it does] not grant a certiorari to review evidence and discuss specific facts," *United States* v. *Johnston*, 268 U.S. 220, 227 (1925).

Comparing the content of this petition with the considerations governing review on certiorari as listed in Rule 17 of the Supreme Court Rules, it is obvious that this certiorari request is particularly inappropriate for Supreme Court review. There are no important federal questions presented by this petition, nor is the Court asked to construe Congressional legislation. There is no conflict among decisions of courts of appeal. There is no involvement in any way of any state court decision. Furthermore, Rockland County's petition was dismissed outright at the beginning of the Court of Appeals' opinion because of its failure to exhaust administrative remedies. The bulk of the Court of Appeals decision, which Petitioner now desires to have reviewed in its entirety, was directed at the NYPIRG-UCS appeal (from which no petition for certiorari was taken), and not at the petition of Rockland County, which was dismissed on procedural grounds. Petitioner has therefore uttterly failed to set forth a basis for the granting of its petition.

## Conclusion

For the reasons set forth herein, the petition of Rockland County for a writ of certiorari should be denied.

Respectfully submitted,

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# APPENDIX

## Appendix A

Pursuant to Rule 28, the following is a list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of each of the Intervenors-Respondents.

1. Intervenor-Respondent Consolidated Edison Company of New York, Inc.'s affiliates and subsidiaries (except wholly owned) are:

Honeoye Storage Company

2. Intervenor-Respondent Power Authority of the State of New York does not have any parent company, affiliates or subsidiaries.